(12)

No. 05-996
Title: Robert Louis Marrama, Petitioner
v.
Citizens Bank of Massachusetts, et al.
Docketed: February 8, 2006
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (04-9009)
Decision Date: October 31, 2005
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 30 2006	Petition for a writ of certiorari filed. (Response due March 10, 2006)
Mar 6 2006	Waiver of right of respondent Mark G. DeGiacomo to respond filed.
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 11 2006	Response Requested . (Due May 11, 2006)
May 9 2006	Brief of respondent Mark G. DeGiacomo, Chapter 7 Trustee in opposition filed.
May 23 2006	DISTRIBUTED for Conference of June 8, 2006.
Jun 12 2006	Petition GRANTED.
Jul 25 2006	Consent to the filing of amicus briefs in suport of either party received from counsel for the petitioner.
Jul 25 2006	Consent to the filing of amicus briefs in support of either party received from counsels for the respondents.
Jul 26 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 7, 2006.
Aug 7 2006	Joint appendix filed. (Joint appendix in two volumes)
Aug 7 2006	Brief of petitioner Robert Louis Marrama filed.
Aug 7 2006	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed.
Aug 14 2006	SET FOR ARGUMENT on Monday, November 6, 2006.
Aug 25 2006	Motion of National Association of Consumer Bankruptcy Attorneys for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 30 2006	Extension of time within which to file respondents' briefs on the merits to and including September 29, 2006.
Sep 13 2006	CIRCULATED.
Sep 20 2006	Joint Motion for divided argument filed by respondent Citizens Bank of Massachusetts, et al. and Respondent Mark G. DeGiacomo, Chapter 7 Trustee
Sep 26 2006	Record received from U.S. Banckruptcy Appellate Panel for the First Circuit.
Sep 27 2006	Record received from U.S. Bankruptcy Court(District of Massachusetts) . (1 box)
Sep 29 2006	Brief amicus curiae of United States filed. (Distributed)
Sep 29 2006	Brief amicus curiae of National Association of Bankruptcy Trustees filed. (Distributed)
Sep 29 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 29 2006	Brief of respondent Mark G. DeGiacomo, Chapter 7 Trustee filed. (Distributed)
Sep 29 2006	Brief of respondents Citizens Bank of Massachusetts, et al. filed. (Distributed)
Oct 3 2006	Response of Mark G. DeGiacomo to motion of the Solicitor General.

Oct 5 2006	Motions DISTRIBUTED for Conference of October 6, 2006..
Oct 10 2006	Motion of National Association of Consumer Bankruptcy Attorneys for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 10 2006	Motion for divided argument filed by respondent DENIED.
Oct 10 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 26 2006	Reply of petitioner Robert Louis Marrama filed. (Distributed)
Nov 6 2006	Argued. For petitioner: David G. Baker, Boston, Mass. For respondents: G. Eric Brunstad, Jr., Hartford, Conn.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
Supreme Court Of The United States

ROBERT LOUIS MARRAMA,

Petitioner

v.

CITIZENS BANK OF MASSACHUSETTS,
And MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The First Circuit Court of Appeals affirmed the decision of the Bankruptcy Appellate Panel for the First Circuit which affirmed the decision of the Bankruptcy Court for the District of Massachusetts denying the request of the Petitioner, Robert Louis Marrama, to convert his bankruptcy case from Chapter 7 to Chapter 13. The bankruptcy court held, in essence, that notwithstanding the plain language of the statute and of the legislative history, the right to convert a case from one chapter to another, found in 11 USC §706(a), can be denied in the bankruptcy court's discretion if the bankruptcy court determines that the request was made in bad faith. In a decision that focused on factual determinations, the Bankruptcy Appellate Panel affirmed. The First Circuit Court of Appeals focused on statutory construction and determined that although the legislative history says that the right to convert is "absolute", the right can be denied in circumstances such as those presented in this case.

The question presented, therefore, is whether the right to convert a chapter 7 bankruptcy case to another chapter can be denied notwithstanding the plain language of the statute and the legislative history.

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OPINION BELOW

The bankruptcy court did not issue a written opinion. The opinion of the Bankruptcy Appellate Panel is reported at In re Marrama (Marrama, Appellant, v. Citizens Bank of Massachusetts, and Mark DeGiacomo, Chapter 7 Trustee, Appellees), 313 B.R. 525 (1st Cir. BAP, 2004). The decision of the Bankruptcy Appellate Panel denying a motion for rehearing was not reported. The opinion of the First Circuit Court of Appeals is reported under the same title at 430 F. 3d 474 (1st Cir. 2005).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

The opinion of the First Circuit Court of Appeals was rendered on October 31, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 11. BANKRUPTCY · UNITED STATES CODE
Chapter 7. Liquidation
Subchapter I. Officers and Administration

11 USC §706. Conversion
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
(b) On request of a party in interest and after notice and a

hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

STATEMENT OF THE CASE

The bankruptcy case was commenced on March 11, 2003. Mark DeGiacomo was appointed trustee (hereinafter "DeGiacomo"). The Meeting of Creditors required by 11 USC §341 commenced on April 24, 2003, and was continued several times, finally concluding on November 18, 2003. At the first meeting, DeGiacomo recommended certain amendments to the schedules, which eventually were made.

The bankruptcy case resulted from the breakdown of a business relationship that Marrama had with Citizens Bank of Massachusetts, or its predecessors, for about 14 years. Citizens had provided a line or lines of credit to Marrama's business, RLM Flooring, Inc. At some point, Marrama requested an increase in his credit line to help him cope with a temporary cash flow problem. In response, Citizens refused the request and instead called in its note, demanding immediate payment in full. When payment was not forthcoming, Citizens commenced litigation in Massachusetts Superior Court for Suffolk County. During the course of pre-trial proceedings, Citizens obtained permission of the Superior Court to take possession of all of RLM's assets, including accounts receivable, thereby effectively shutting down the business. Having been rendered unemployed, Marrama sought bankruptcy relief in order to gain "breathing room" and develop a source of income. Being then unemployed, Marrama did not qualify to file under Chapter 13, as he did not have a regular income as required by 11 USC §109(e). The state court litigation never went to trial.

Among Marrama's assets was a "summer home" in York, Maine, and his permanent residence in Gloucester, Massachusetts. Although the Maine property was owned in a spendthrift trust, the bankruptcy court determined that the

trust was not valid[1]. Accordingly, DeGiacomo, as chapter 7 trustee, liquidated that property. On the date of the bankruptcy petition, Marrama was residing in the Maine property. Thus, Citizens took the position that Marrama's homestead exemption for the Gloucester property, claimed pursuant to state law, was invalid. In a published decision, In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004), the bankruptcy court overruled Citizens' position. Thus Marrama is presently living in Gloucester, Maine, and that property is properly exempted from the bankruptcy estate.

Once Marrama was able to find employment[2], he sought to convert the case to Chapter 13 so that he could cure the arrears on his mortgages that arose due to the financial problems that arose from the Citizens litigation, and thereby keep his homes. Both the Trustee and Citizens objected to the conversion, claiming essentially that the request was made in bad faith; there was no allegation that Marrama was not qualified to be a debtor under chapter 13. The bankruptcy court, alluding to one of its own published decisions, denied conversion. On intermediate appeal, the Bankruptcy Appellate Panel affirmed, and denied a motion for rehearing.

A timely appeal to the First Circuit followed. The First Circuit affirmed.

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[1] This statement results from the fact that the bankruptcy court allowed DeGiacomo's motion to revoke the trust. The motion was allowed without a hearing, so the bankruptcy court's reasoning is not known with certainty, but that the bankruptcy court so determined is a reasonable inference from allowance of the motion.

[2] His family has been in the flooring business for at least two generations. Thus he was able to find employment with a brother's flooring company.

REASONS FOR ALLOWANCE OF THE PETITION

Whether a debtor in a chapter 7 bankruptcy case has the absolute right to convert the case to another chapter is an important question, implicating a substantive right granted to debtors by congress as well as the public policy behind the grant of the right. Even the most cursory review of decisions on this issue, at all judicial levels, will disclose that the law is in complete disarray.

For example, the decision of the First Circuit in this case primarily relied on In re Finney, 992 F.2d 43, 45 (4th Cir.1993) and Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989). In fact, most cases – on both sides of the question – rely on the Fifth Circuit's decision in Martin. Recently, however, the Fifth Circuit had occasion to revisit the issue and to interpret the Martin decision. *See* In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (2005). Although this appears to be an otherwise unpublished decision, it is directly on point and highly material to the present petition, and should be considered by this Court. In this decision, the Fifth Circuit recognized that there is *dicta* in the Martin decision that could be interpreted otherwise, but the court nonetheless stated that "[t]he statutory language makes it clear that the right to convert is absolute and unqualified." Id. at 162.

Faced with this question in a somewhat different context, the Bankruptcy Appellate Panel for the Tenth Circuit also held that the right is absolute and can be exercised *even after* the debtor has received a discharge under Chapter 7. *See* In re Miller, et al, 303 B.R. 471 (10th Cir., 2003). In that case, the Panel found "that a bankruptcy court may not exercise its discretion to evaluate other circumstances when considering a motion to convert under §706, but is restricted

to considering whether the debtor meets the requirements delineated in the plain language of the statute."

The Sixth Circuit disagreed with both the Fifth Circuit Court of Appeals and the Tenth Circuit Bankruptcy Appellate Panel. In re Copper, 426 F.3d 810 (6th Cir. 2005). The Sixth Circuit expressly recognized the split of authority and that "fair arguments can be made for either position." Id. at 817. Nonetheless, the Sixth Circuit concluded that conversion may be denied in the absence of good faith.

Ultimately, the petitioner respectfully suggests that the opinion of the Ninth Circuit Bankruptcy Appellate panel is highly informative and persuasive, as it collects cases on both sides of the issue and thoroughly analyzes the statute and the related Federal Rule of Bankruptcy Procedure. *See* In re Croston, 313 B.R. 447 (9th Cir. BAP 2004). That panel "agree[d] with the courts that view the right to convert as absolute", and further noted that "[s]ometimes, a problem debtor surprises everyone and winds up confirming and performing a chapter 13 plan that pays creditors more than they would receive in chapter 7 and leaves everyone better off." *Cf.* In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995) (holding that the right to convert from Chapter 7 to Chapter 11 is absolute; collecting cases).

The legislative history of 11 USC §706 makes it clear that the right is absolute:

> Subsection (a) of this section gives the debtor the one-time *absolute* right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

(emphasis added) H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. The First Circuit, however, limited the right to "honest" debtors, that is, debtors that do not appear to the court to be "manipulating" the bankruptcy code[3] as perceived by the court. However, as the decisions on the other side of the issue make clear, there are ways of remedying such manipulation without thwarting the plainly-expressed will of Congress. *See, e.g.*, Croston and Porras, *supra*.

For these reasons, certiorari is warranted to resolve the split among the circuits on this issue, and bring order to the disarray that is reflected by the plethora of decisions from bankruptcy courts, Bankruptcy Appellate Panels, District Courts, and Circuit Courts.

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[3] The petitioner, of course, adamantly denies any dishonesty in these proceedings, and the record is devoid of any competent evidence to the contrary since the bankruptcy court did not hold an evidentiary hearing. The First Circuit justified this by saying that the petitioner never requested an evidentiary hearing. While a trial court plainly may render judgment summarily when there are no material facts in dispute, *see* Fed.R.Civ.P. 56, the existence of a dispute over material facts requires an evidentiary hearing even if one has not been expressly requested. Marrama's "intent" is plainly a material, disputed fact.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,
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By his attorney,

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APPENDIX

313 B.R. 525

United States Bankruptcy Appellate Panel
of the First Circuit.
In re Robert Louis MARRAMA, Debtor.
Robert Louis Marrama, Appellant,
v.
Citizens Bank of Massachusetts, and Mark DeGiacomo,
Chapter 7 Trustee, Appellees.

BAP No. MB 04-001.
Bankruptcy No. 03-11987-WCH.
Sept. 9, 2004.

Background: Order was entered by the United States Bankruptcy Court for the District of Massachusetts, William C. Hillman, J., denying verified notice of conversion filed by Chapter 7 debtor. Debtor appealed.

Holdings: The Bankruptcy Appellate Panel, Lamoutte, J., held that:
(1) Chapter 7 debtor whose bankruptcy case had not previously been converted did not have absolute right to convert case to one under Chapter 13, but only a presumptive right that could be denied for extreme circumstances; and
(2) "extreme circumstances" existed sufficient to justify denying Chapter 7 debtor's purported exercise of one-time right to convert case.

Affirmed.

*526 David G. Baker, Charlestown, MA, on brief, for Appellant.
Jack J. Mikels, Quincy, MA, Michael A. Wirtz, Boston, MA, Janell E. DeGennaro, on brief, for Appellee Citizens Bank of Massachusetts.

Mark G. DeGiacomo, Boston, MA, Olga L. Bogdanov, Worcester, MA, on brief, for Appellee Mark G. DeGiacomo as Chapter 7 Trustee.

Before LAMOUTTE, VAUGHN, and CARLO, United States Bankruptcy Appellate Panel Judges.

LAMOUTTE, Bankruptcy Judge.

Robert Louis Marrama (the "Debtor" or the "Appellant") appeals the August 27, 2003 order (the "Order") entered by the United States Bankruptcy Court for the District of Massachusetts (the "bankruptcy court") denying his Verified Notice of Conversion to Chapter 13 (the "Notice"). The issue before the Panel is two-fold; that is, whether the bankruptcy court may deny a Chapter 7 debtor the right to convert a Chapter 7 case to Chapter 13, and if so, ***527** whether the bankruptcy court was correct in doing so under the particular facts of this case. We affirm.

BACKGROUND

On March 11, 2003, the Debtor filed a voluntary Chapter 7 petition and schedules. App. at 17. [FN1] Schedule A listed a "Residence in Gloucester, MA" (the "Massachusetts Property") as the Debtor's only real property. On Schedule B, the Debtor answered Question 18 by stating: "Debtor is 100% beneficiary of Bo-Mar Realty Trust [(the 'Trust')] the res of which is real property in Maine in which the debtor intends to live. Trust is a spendthrift trust." The current market value of the Debtor's interest in the Trust was listed as zero. On Schedule C, the Debtor claimed a homestead exemption in the Massachusetts Property, listing $300,000 as the maximum value of the claimed exemption, and $200,000 as the current market value of the property without deducting the

exemption. Schedule C also provided: "The beneficial interest in the Bo-Mar Realty Trust is not property of the estate pursuant to 11 U.S.C. § 541(c)." Schedule I stated no income generated by real property, and listed a total combined monthly income of $5,762. Schedule J included total monthly expenses of $4,925.95. On March 24, 2003, the Debtor filed a motion to avoid the liens on the Massachusetts Property, arguing that the same impaired his homestead exemption.

FN1. Citations to the Appendix refer to Appellant's Appendix, attached to his Brief. Although the pages of the Appendix are not sequentially numbered, said page numbers have been calculated by the Panel and the contents of the Appendix are referred to accordingly.

The § 341 meeting of creditors commenced on April 24, 2003, was continued over the course of several months, and concluded in November, 2003. *Id.* At the April 24, 2003 creditors' meeting, [FN2] the Debtor testified that he was currently residing at 47 Norton Avenue in York, Maine (the "Maine Property"), and that he had been doing so for a couple of months. Appellee's App. at 33. The Debtor further testified that his Massachusetts Property serves as rental property, generating a total of $2,150.00 a month beginning on May 1, 2003. [FN3] *Id.* at 34.

FN2. Although the transcript of the April 24, 2003 creditors' meeting was not before the bankruptcy court when it denied the Notice of Conversion, the bankruptcy court did hear arguments pertaining to matters that arose in that meeting. This Panel has previously allowed the transcript of a § 341 creditors' meeting to be part of the record on appeal where

matters pertaining to that meeting were presented in arguments to the bankruptcy court. *See* Cabral v. Shamban (In re Cabral), 285 B.R. 563 (1st Cir. BAP 2002). In the *Cabral* case, the Panel had issued a pre-argument order denying the Appellee's motion to strike the transcript from the record.

FN3. The Massachusetts Property consists of two units; one renting for $1,500.00 and the other for $600.00. Appellee's App. at 34.

The Debtor testified that he had purchased the Maine Property several years ago, and had later conveyed it to the Trust for no consideration. *Id.* at 18, 37. The Debtor referred to the property as belonging to him, saying "I have a piece of property in Maine." *Id.* at 6. His attorney corrected him, explaining, "[t]hat's actually owned by the trust, right?" *Id.* When asked why he transferred the Maine Property into the Trust, the Debtor testified that he was trying to protect it. *Id.* at 37. The Debtor is the sole beneficiary of the Trust, and his girlfriend is the trustee. *Id.* at 16. The Trust contains a spendthrift clause and is revocable. *See id.* at 47. The transfer of the Maine Property to the ***528** Trust was not disclosed in the Statement of Financial Affairs.

On June 23, 2003, the Debtor filed a Verified Notice of Conversion to Chapter 13 (the "Notice of Conversion"). App. at 17. In response to the Notice of Conversion, the Appellees each filed opposition pleadings. *Id.* Pointing out that the Debtor had claimed a homestead exemption in property where he did not reside, and that the Debtor had transferred the Maine Property into a trust for his own benefit which he failed to disclose on his bankruptcy schedules, the Trustee's

opposition argued that the Debtor's request for conversion was made in bad faith with an intent to prevent the Trustee's recovery of assets on behalf of the estate. *Id.* at 2. The Trustee's opposition stated that the Debtor did not disclose the transfer of the Maine Property in response to Question 10 of the Statement of Financial Affairs or anywhere else in his bankruptcy petition. *Id.* The Debtor responded to the Trustee's opposition, denying the allegations of bad faith and asserting that the Maine Property had been properly disclosed on Schedule B. *Id.* at 6.

Citizens Bank, like the Trustee, argued that the Debtor's request for conversion lacked good faith, and added that such a conversion would result in abuse of the bankruptcy process. *Id.* at 9. In addition to the Trustee's arguments regarding the Maine Property, Citizens Bank's opposition asserted that the Debtor's Schedule I failed to disclose income generated by rental of the Massachusetts Property. *Id.* Citizens Bank's opposition further alleged that the Debtor had participated in improper, and possibly illegal, activity in connection with his company's assets, and that the Debtor had been uncooperative with regard to a civil action Citizens Bank had commenced to enforce collection of its loans and obtain equitable relief to seize the business records and manage the collection of the company's receivables. *Id.*

On August 11, 2003, the Debtor filed amended Schedules I and J. Amended Schedule I listed income from rental property of $1,500, bringing the Debtor's total combined monthly income up to $7,184.77. Amended Schedule J reflected an increase in monthly expenses, with a new total of $5,828.00.

On August 27, 2003, the bankruptcy court held a hearing on the Notice of Conversion (the "Hearing"). At the Hearing, the Appellees reiterated the arguments presented in their oppositions. *Id.* at 33. Specifically, the Trustee alleged that the Debtor failed to disclose on his Statement of Financial Affairs the transfer of his Maine Property into the Trust within a year of filing bankruptcy for the purpose of protecting it. The Trustee alleged that the transfer was a fraudulent transfer. The Trustee further argued that the Debtor failed to disclose in his schedules receipt of rental income from the Massachusetts Property or entitlement to a tax refund of $8,700 that the Trustee had recently learned about. The Trustee asserted that the Debtor decided to convert to Chapter 13 only after the Trustee informed him at the § 341 meeting that the Trustee would seek to recover the $85,000 of equity in the Maine Property.

Citizens Bank summarized the contentious state court litigation between itself and the Debtor, which was stayed at the discovery stage by the Debtor's bankruptcy filing. Citizens Bank explained that the Debtor had filed criminal complaints against two bank vice-presidents and the bank's attorney because they went to shut down the Debtor's company under court order. The bank further explained that the Debtor had avoided giving interrogatory or deposition testimony in the state court action as well as during his 2004 examination in the bankruptcy proceeding ***529** by asserting his Fifth Amendment privilege.

The Debtor denied the allegations of bad faith, and argued that any omissions were inadvertent or of no harm to the estate. *Id.* Specifically, the Debtor explained that he had not started receiving rental income from the Massachusetts

Property until after he filed his petition. The Debtor's attorney attributed the Debtor's failure to disclose the transfer of the Maine Property to his own scrivener's error, explaining that he had known about the transfer, but had inadvertently omitted it from the Statement of Financial Affairs. Regarding the tax refund, the Debtor asserted that he learned about it the same time the Trustee did. The Debtor also explained that he had not sought conversion to Chapter 13 because the Trustee was going to pursue recovery of assets; rather, he had sought conversion because he became employed subsequent to the filing of his Chapter 7 petition.

The bankruptcy court reasoned that there is no "oops" defense to concealment, and that filers have an obligation to provide accurate information. *Id.* The bankruptcy court further found that there is "a major presumption of bad faith when you have a grantor trust within a year of the bankruptcy and the property is not disclosed." *Id.* Comparing the present case to the recent *Fleury* [FN4] decision, the bankruptcy court concluded that "[t]his is a bad faith case," and denied the conversion. *Id.* This appeal followed.

FN4. *See In re Fleury*, 294 B.R. 1 (Bankr.D.Mass.2003), *aff'd*, 306 B.R. 722 (1st Cir. BAP 2004). In *Fleury*, the bankruptcy court found that a Chapter 13 debtor had filed her petition in "bad faith" where she had failed to pay any divorce-related debt through a previous Chapter 13 case that had dissipated more than $350,000. Based on the finding of "bad faith," the bankruptcy court dismissed the case with prejudice to the debtor's ability to re-file for 360 days.

JURISDICTION

[1] [2] [3] A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees pursuant to 28 U.S.C. § 158(a)(1), or with leave of the court, from interlocutory orders and decrees pursuant to 28 U.S.C. § 158 (a)(3)." *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 645 (1st Cir. BAP 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Id.* at 646 (citations omitted). An interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Id.* (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. *See In re George E. Bumpus, Jr. Constr. Co.*, 226 B.R. 724 (1st Cir. BAP 1998).

[4] The Panel finds that it has jurisdiction over this appeal pursuant to § 158(a)(1) as the bankruptcy court's order denying conversion to Chapter 13 constitutes a final order. *See Kuntz v. Shambam (In re Kuntz)*, 233 B.R. 580, 582 (1st Cir. BAP 1999).

STANDARD OF REVIEW

[5] [6] Appellate courts reviewing an appeal from the bankruptcy court generally apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. *See* ****530** T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir.1995); *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 719-20, n. 8 (1st Cir.1994). Whether a bankruptcy court properly denied a debtor's request for

conversion is a question of law requiring *de novo* review on appeal. *Kuntz*, 233 B.R. at 582.

DISCUSSION

I. Is there an absolute right to convert a Chapter 7 case to Chapter 13?

[7] Section 706(a) of the Bankruptcy Code provides that:

> The [chapter 7] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. § 706(a). The legislative history of § 706(a) characterizes the debtor's right to convert as "absolute," stating that "[s]ubsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case." S.Rep. No. 95-989, at 94 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. This history has been found to reflect Congress' desire to encourage debtors to choose one of the reorganization chapters over Chapter 7. *Matter of Martin*, 880 F.2d 857, 859 (5th Cir.1989) ("The policy of the provision is that the debtor should always be given the opportunity to repay his debts.") (quoting H.Rep. No. 95-595, 95th Cong.2d Sess. 380, U.S.Code Cong. & Admin.News 1978, 5963, 6336).

However, this Panel has previously held that a debtor's one-time right to convert a Chapter 7 case to Chapter 13 is not absolute, but may be denied in extreme circumstances constituting bad faith. *See Kuntz*, 233 B.R. at 583 (citing

Matter of Martin, 880 F.2d at 859, and *In re Calder*, 93 B.R. 739 (Bankr.D.Utah 1988)). It noted that "consistent with the underlying policy of § 706(a), courts which have considered the debtor's right to conversion vis-a-vis his actions during the Chapter 7 case have required a substantial showing prior to denying the request." *Id.* at 583. The Panel concluded that the circumstances in *Kuntz* were not sufficiently egregious to warrant a denial of conversion. *Id.* at 585.

In a subsequent decision, this Panel, relying on the rationale in *Kuntz*, held that the unrebutted facts were not only sufficient to raise an inference of bad faith under 11 U.S.C. § 1307(c), but also constituted "extreme circumstances" sufficient to deny conversion from Chapter 7 to Chapter 13 under § 706(a). *See Cabral v. Shamban (In re Cabral)*, 285 B.R. 563, 575 (1st Cir. BAP 2002). The factors found to constitute bad faith and extreme circumstances included the debtor giving misleading testimony at the § 341 meeting of creditors, substantial differences between the debtor's original and amended schedules, and the omission in the Chapter 13 plan and liquidation analysis of the likelihood of a substantial settlement offer of a personal injury claim. *Id.*

There is a split of authority among courts which have considered the issue as to whether the debtor's right to convert a case from Chapter 7 to Chapter 13 pursuant to 11 U.S.C. § 706(a) is "absolute" or subject to some measure of judicial discretion. While some courts and authors have characterized the different positions as the majority view or minority view, the Hon. David S. Kennedy has commented that "[i]t is somewhat difficult to determine at this time in the development of the decisional law which view actually represents the majority or minority of courts, especially

considering the fact that conflicting ***531** reported opinions substantiating the statutory right as an absolute one or qualified right seemingly appear in almost every new bankruptcy advance sheet." David S. Kennedy, "Current Controversies Centering Around a Debtor's Statutory and Procedural Right to Convert an Originally Filed Chapter 7 Case to a Case under Chapter 11 or 13 of the Bankruptcy Code and Related Matters", *18th Annual Current Developments in Hot & Emerging Areas,* Commercial Law League of America, October 16, 2003 (citing *In re Ponzini,* 277 B.R. 399, 404 n. 3 (Bankr.E.D.Ark.2002) ("[T]his Court's review of recent rulings on this issue reveal a larger number of courts adopting what was previously referred to as the minority view (*i.e.* the view that a debtor does not have an absolute right to convert under § 706(a)), such that it is no longer clear which is the majority or minority view.")).

A substantial number of cases, including those from this Panel which have addressed the issue, have held that the right to convert from Chapter 7 to Chapter 13 is absolute only in the absence of extreme circumstances. *See, e.g., Matter of Martin,* 880 F.2d at 859 (courts refuse to interfere with right to convert in absence of extreme circumstances); *Martin v. Cox,* 213 B.R. 571 (E.D.Ark.1996), *aff'd,* 116 F.3d 480 (8th Cir.1997); *Cabral,* 285 B.R. at 575. The extreme circumstances approach requires the bankruptcy court to make a factual determination as to the existence of extreme circumstances, such as bad faith, abuse of process, or other gross inequity, and such cases typically involve egregious conduct on the part of the debtor, who is seeking to use the bankruptcy process abusively and selfishly rather than for its intended purpose. Kennedy, *supra,* at 296.

Other courts look at the totality of the circumstances surrounding the debtor's request to convert his case, balancing the purpose of, and policies underlying, Chapter 13, as well as the debtor's motivation in seeking conversion, and the reasons the debtor did not originally file under Chapter 13. Kennedy, *supra,* at 300 (citing *In re Gallagher,* 283 B.R. 604, 606 (Bankr.M.D.Fla.2002)). This approach is similar to the extreme circumstances approach, and many of the same factors overlap. Such factors may include whether the debtor is seeking to convert in good faith; whether the debtor can propose a confirmable Chapter 13 plan; the impact of denying conversion on the debtor weighed against the prejudice to creditors by allowing conversion; the effect of conversion on the efficient administration of the bankruptcy estate; and whether conversion will further an abuse of the bankruptcy process. Kennedy, *supra,* at 301 (citing *Pakuris,* 262 B.R. 330, 335-36 (Bankr.E.D.Pa.2001)); *see also In re Marcakis,* 254 B.R. 77, 82 (Bankr.E.D.N.Y.2000) (court must consider possibility of abuse, prejudice to other parties or creditors, eligibility of the debtor, and all circumstances generally); *In re Krishnaya,* 263 B.R. 63 (Bankr.S.D.N.Y. 2001).

[8] In analyzing the debtor's good faith, [FN5] the court may consider whether the debtor has been forthcoming; whether the ***532** debtor has failed to disclose potentially beneficial interests of non-bankruptcy litigation or has omitted assets from his schedules and statements; whether disclosure was prompted by an investigation by the trustee or the filing of dischargeability litigation; and whether the debtor has made a complete, reliable and full disclosure; as well as the timing of the motion to convert-- that is, whether it occurs after the entry of the Chapter 7 discharge. Kennedy, *supra,* at 301-302

(citing *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987); *In re Carter*, 285 B.R. 61, 67 (Bankr.N.D.Ga.2002); *Gallagher*, 283 B.R. at 607; *Pakuris*, 262 B.R. at 336; *In re Porter*, 276 B.R. 32, 37-38 (Bankr.D.Mass.2002) ("The Court must determine whether conversion under these circumstances is appropriate pursuant to the overall purpose and policy of the Bankruptcy Code, and although the Debtor's right to convert is nearly absolute, the matter remains within the discretion of the Court."); *In re Mosby*, 244 B.R. 79, 86 (Bankr.E.D.Va.2000); *In re Thornton*, 203 B.R. 648 (Bankr.S.D.Ohio 1996)). In *Boroff v. Tully*, the First Circuit, while noting that the statutory right to a discharge is generally construed in favor of the debtor, observed that the purpose of certain sections of the Bankruptcy Code is to make sure that "those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs" and to "insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction." 818 F.2d at 110.

FN5. The consideration of a debtor's good faith in converting a Chapter 7 case to Chapter 13 has been criticized by one commentator, who noted:

> The debtor's good faith in first filing a Chapter 7 case and then converting to Chapter 13 is most appropriately tested at confirmation under § 1325(a)(3) using the usual good-faith rules applicable in the circuit. No obvious good purpose is served by overlaying a whole new jurisprudence of good faith as a judge-imposed condition on conversion from Chapter 7 to Chapter 13.

Keith M. Lundin, 4 *Chapter 13 Bankruptcy* § 325.1 at 325-14 (3d ed.2002).

[9] [10] The Panel concludes that a bankruptcy court may use the totality of the circumstances approach to determine whether the same are extreme and warrant denial of a Chapter 7 debtor's motion to convert to Chapter 13 under § 706(a). [FN6] The plain language of § 706(a), when read together with other sections of the Bankruptcy Code and Rules [FN7], does not grant a ***533** debtor an absolute right to convert a case from Chapter 7 to Chapter 13; rather, the right to convert is presumptive and should be granted unless there are extreme circumstances showing that the debtor is abusing the jurisdiction of the bankruptcy court. While there is no specific test for determining "extreme circumstances" that constitute bad faith, one important factor is whether a debtor intentionally attempted to conceal assets from creditors. *See Cabral*, 285 B.R. at 574-75; *Kuntz*, 233 B.R. at 585.

FN6. In affirming the "totality of the circumstances" or "extreme circumstances" approach, this Panel rejects the application of § 105 to motions for conversion under § 706. While § 105 empowers the bankruptcy courts with broad equitable and discretionary powers to deal with situations not explicitly covered by the Bankruptcy Code, using § 105 to override the plain language of § 706 has been criticized by courts which hold that § 105(a) should not be used contrary to the clear wording of the Bankruptcy Code, its legislative history, and the Rules of Bankruptcy Procedure. *In re Rashid*, 97 B.R. 610, 615 (W.D.Okla.1989); *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir.1987), *cert. denied*, 485 U.S. 962, 108 S.Ct. 1228, 99 L.Ed.2d 428

(1988); *United States v. Sutton*, 786 F.2d 1305, 1307-08 (5th Cir.1986). The First Circuit has stated "section 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand." *Jamo v. Katahdin Federal Credit Union (In re Jamo)*, 283 F.3d 392, 403 (1st Cir.2002) (bankruptcy court lacked power to modify a reaffirmation agreement or compel the parties to enter into a judicially-crafted reaffirmation agreement). *Accord Holyoke Nursing Home, Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.)*, 372 F. 3d 1, 5 (1st Cir.2004) ("[T]he equitable powers of the bankruptcy court do not accord it 'a roving commission to do equity,' nor 'authorize courts to create substantive rights that are otherwise unavailable under the Code.' ") (quoting *In re Ludlow Hosp. Soc'y, Inc.*, 124 F.3d 22, 27 (1st Cir.1997)).

FN7. For example, § 706(a) states that the court "may" convert a case at any time, while § 1307(b) states that the court "shall" dismiss a case upon request of the debtor at any time; "[t]he statute's use of the verb 'may' rather than 'shall' supports the view that the right granted by § 706(a) is presumptive rather than absolute." *Ponzini*, 277 B.R. at 404. Further, several courts have observed that Fed. R. Bankr.P. 1017(f)(2)'s requirements that conversion under § 706(a) be made on motion, filed and served as required by Fed. R. Bankr.P. 9013, along with Fed. R. Bankr.P.2002(a)(4)'s requirement of 20 days' written notice of a hearing on conversion, indicate that the "right" to convert under §706(a) is not absolute. *Id.* at 405.

II. Are there extreme circumstances constituting bad faith in this case?

[11] In *Kuntz*, the Panel concluded that a Chapter 7 debtor's three month delay in reporting a post-petition inheritance did

not rise to the level of bad faith. *Kuntz,* 233 B.R. at 585. There, the Panel explained that there was no evidence to support the conclusion that the debtor intended to hide the asset or that he purposefully shielded the asset from his creditors. *Id.* Acknowledging that the three month delay may indicate a subjective bad faith on behalf of the debtor, the Panel noted that such an implication was tempered by several factors: the debtor's voluntary disclosure of the asset prior to entry of the discharge, his subsequent cooperation with the trustee, preservation of the asset, and prompt retention of a bankruptcy attorney for the purpose of filing a Chapter 13 plan. *Id.*

In *Cabral,* however, the Panel found that the debtor's actions did constitute extreme circumstances sufficient to deny conversion. *Cabral,* 285 B.R. at 575. There, the debtor had given misleading testimony at the § 341 meeting, filed amended schedules that differed substantially from her original schedules, and failed to include in either her Chapter 13 plan or Liquidation Analysis any reference to the likelihood of a substantial settlement offer from a personal injury claim. *Id.* Such actions caused the bankruptcy court to conclude that the debtor "was attempting to manipulate the Bankruptcy Code and to conceal the value of her personal injury claim from her creditors." *Id.* at 574. In affirming the bankruptcy court's order reconverting the debtor's case back to Chapter 7, [FN8] the Panel held that the unrebutted facts not only raised the inference of bad faith for purposes of § 1307(c), but also constituted "extreme circumstances" which are sufficient to deny conversion of the case from Chapter 7 to Chapter 13 under § 706(a). *Id.* at 575.

FN8. Unlike the instant case, in *Cabral* the bankruptcy court had converted the debtor's case to Chapter 13 immediately upon receipt of the notice of conversion. Accordingly, the bankruptcy court treated the objections as motions for reconsideration of the conversion, and ultimately entered an order reconverting the case back to Chapter 7.

In the instant case, the bankruptcy court, in denying the Debtor's request for conversion, concentrated on the Debtor's concealment of assets, or more specifically, on the concealment of the transfer of assets. The bankruptcy court stated that "there is an obligation on the part of people who file schedules in bankruptcy cases to get it right" and there is a "major presumption of bad faith when you have a grantor trust within a year of the bankruptcy and the property is not disclosed." App. at 41. The bankruptcy court concluded that "[t]his is a bad faith case." *Id.*

The Panel finds that the bankruptcy court's decision to deny conversion was sufficiently supported by the evidence before ***534** the court. The Debtor identified his interest in the Maine Property, denoting it as personal property on Schedule B at Question 18. The Debtor declared that "Debtor is 100% beneficiary of Bo-Mar Realty Trust the res of which is real property in Maine in which the debtor intends to live. Trust is a spendthrift trust." The Debtor valued his interest in the trust at zero. The Debtor did not, however, disclose in his answer to Question 10 on the Statement of Financial Affairs that he transferred the Maine Property into the trust within one year of the petition date. The Trustee's inquiry at the § 341 meeting into the nature of the trust and the transfer brought out the date of the transfer and that the Debtor had transferred his own property, for no consideration, into a revocable trust,

for which his girlfriend was the trustee. At the same time, the Debtor also admitted that the transfer was made for the purpose of protecting the Maine Property. While the Debtor argued that the failure to list the transfer was a mistake, his failure to list it was consistent with his intent to protect it. Moreover, the Debtor did not seek to amend Schedule B and the Statement of Financial Affairs until September 15, 2003, that is, after the bankruptcy court denied his motion to convert to Chapter 13.

Other factors also support the bankruptcy court's decision to deny conversion. On March 11, 2003, when the Debtor filed this petition, he claimed a homestead exemption in the Massachusetts Property. On March 24, 2003, the Debtor filed a motion seeking to avoid liens on the Massachusetts Property as impairing his homestead exemption. He filed a memorandum in support of his motion on May 27, 2003. At the continuation of the § 341 hearing, held on April 24, 2003, the Debtor testified that he was residing at the Maine Property and had been doing so for a couple of months. The Debtor also testified that beginning on May 1, 2003, he would begin receiving rental income from the Massachusetts Property. Likewise, on Schedule B, the Debtor answered Question 18, indicating that he intended to live at the Maine Property. Thus, the Debtor's actions in claiming an exemption in the Massachusetts Property and seeking to avoid liens against it were not consistent with his intended and actual move to the Maine Property. We conclude that the Debtor attempted to obtain a homestead exemption in property in which he did not intend to reside.

Furthermore, the Debtor also failed to list the tax refund. In Schedule B, Item 17, the Debtor is directed to identify

liquidated debts, including tax refunds. The Debtor's response, under oath, was "none." At the hearing on the request for conversion, Debtor's counsel contended that the Debtor filed an amended tax return in July of 2002, seeking the refund. Thus, his alleged lack of awareness of the refund is incompatible with the fact that he applied to the Internal Revenue Service for the refund.

Finally, the Debtor contends that he sought conversion because he became employed and began receiving rental income. However, prior to his request for conversion, the Trustee indicated his intention of seeking to recover the Maine Property. The Trustee also sought and obtained an extension of time to file a complaint objecting to discharge. Thus, the timing of the Debtor's request for conversion is suspect.

The Debtor's actions in the instant case were more egregious than the debtor's actions in *Kuntz.* Unlike the debtor in *Kuntz,* who simply delayed the disclosure of a post-petition asset, this Debtor appears to have taken affirmative attempts to conceal assets from creditors, beginning with the pre-petition transfer of the Maine Property into a revocable trust. Then, the ***535** Debtor made affirmative misrepresentations on his schedules regarding his homestead exemption, the value of his interest in the Trust, and the rental income generated by the Massachusetts Property. Additionally, the Debtor did not initiate disclosure of the assets, and only did so when asked direct questions at the § 341 meeting. Thus, this Debtor did not take steps to preserve his assets for the benefit of his creditors like the debtor in *Kuntz* did; instead, the intent behind the Debtor's transfer of the Maine Property for no

consideration was to preserve the asset for his personal benefit, and place it beyond the reach of his creditors.

Furthermore, while the debtor in *Cabral* acted egregiously in regard to concealment of one asset, this Debtor's actions are arguably more egregious because there seems to have been a pattern of attempts to conceal assets--a pattern that began before the Debtor filed his petition when he transferred the Maine Property for no consideration to the Trust, and continued post-petition until the Chapter 7 Trustee threatened action to recover the Maine Property. As has been stated by the United States Supreme Court, the opportunity provided by the bankruptcy law for a "fresh start" is limited to the "honest but unfortunate debtor." *Grogan v. Garner,* 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Accordingly, we resolve, in conformity with our prior decisions in *Kuntz* and *Cabral,* that the bankruptcy court has authority to deny a debtor's request for conversion to Chapter 13. The Panel is not persuaded to overturn the rationale of its previous decisions and find that the debtor's right to convert pursuant to 11 U.S.C. § 706(a) is absolute and not subject to any judicial discretion despite the circumstances of the conversion. The bankruptcy court was correct in denying the Debtor's request for conversion because of the existence of "extreme circumstances" constituting bad faith.

CONCLUSION

For the reasons discussed above, the bankruptcy court's order denying the Notice of Conversion is AFFIRMED.

1st Cir.BAP (Mass.),2004.

In re Marrama

313 B.R. 525

United States Court of Appeals, First Circuit.
In re Robert Louis **MARRAMA,** Debtor.
Robert Louis **Marrama,** Appellant,
v.
Citizens Bank of Massachusetts and Mark G. DeGiacomo,
Chapter 7 Trustee, Appellees.
No. 04-9009.

Heard March 8, 2005.
Decided Oct. 31, 2005.

Appeal from the Bankruptcy Appellate Panel of the First Circuit.

David G. Baker, for appellant.

Mark G. DeGiamomo, with whom Olga L. Bogdanov and Murtha Cullina LLP were on brief for appellee Mark G. DeGiacomo.

Jack J. Mikels, Michael A. Wirtz, Janell E. DeGennaro, and Jack Mikels & Associates on brief for appellee Citizens Bank of Massachusetts.

Lynn F. Riley, with whom Gary Klein, Roddy, Klein & Ryan, and John Rao, National Consumer Law Center, were on brief for Amicus Curiae, National Association of Consumer Bankruptcy Attorneys.

Before HOWARD, Circuit Judge, CYR and STAHL, Senior Circuit Judges.

CYR, Senior Circuit Judge.

Robert Louis Marrama appeals from the bankruptcy court order which rejected his petition to convert these proceedings from chapter 7 to chapter 13, based on its determination that Marrama had attempted to conceal assets from creditors. We affirm.

I
BACKGROUND

In August 2002, Marrama transferred residential real estate in York, Maine, having an unencumbered value of $85,000, to a revocable spendthrift trust, for no consideration, and designated himself sole beneficiary and his girlfriend sole trustee. Marrama's acknowledged intent was to protect the property from the claims of creditors. Seven months later, he submitted a voluntary chapter 7 petition, together with a statement of financial affairs wherein he (i) disclosed that he was the Trust's beneficiary, (ii) listed the value of its *res* as zero, (iii) denied making any property transfers within one year preceding the filing of the chapter 7 petition, and (iv) asserted that the IRS owed him no tax refunds. [FN1] Whereas, Marrama was due a tax refund exceeding $11,000.

In June 2003, the chapter 7 trustee questioned Marrama regarding these apparent discrepancies. Rather than responding, Marrama filed notice in the bankruptcy court, pursuant to Bankruptcy Code ß 706(a), seeking to convert the chapter 7 case to a chapter 13 debt-restructuring proceeding, based upon his contention that, more recently, he had acquired additional rental income and gainful employment. The chapter 7 trustee opposed the conversion on the ground that Marrama intentionally failed to disclose in his schedules the preferential transfer of the Maine property

into the trust some seven months prior to his chapter 7 petition, as well as his anticipated federal tax refund. The debtor contended that these misstatements and omissions were inadvertent.

Following a non-evidentiary hearing, the bankruptcy court refused to permit the conversion to chapter 13, on the ground that the deceptive statement of financial affairs demonstrated Marrama's "bad faith." Marrama appealed to the BAP, which affirmed. In re Marrama, 313 B.R. 525 (BAP 1st Cir.2004). [FN2] The present appeal fails as well.

II
DISCUSSION

On an appeal from a BAP decision, we review *de novo* the legal determinations of the bankruptcy court, and its findings of fact for clear error. *See* Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107-08 (1st Cir.1997).

A. *Section 706(a) and "Bad Faith" Conversion*

The initial issue on appeal is whether Bankruptcy Code ß 706(a) confers any discretion upon the bankruptcy court to forfend against "bad faith" conversions to chapter 13, or the debtor has an "absolute" right to convert. Interpretation of subsection 706(a) presents a pure issue of law, engendering *de novo* review. *See* HSBC Bank USA v. Branch (In re Bank of New England Corp.), 364 F.3d 355, 361 (1st Cir.), *cert. denied,* --- U.S. ----, 125 S.Ct. 318, 160 L.Ed.2d 225 (2004). Subsection 706(a) provides:

> The debtor *may* convert a case under this chapter [*viz.*, chapter 7] to a case under chapter 11, 12, or 13 of this title *at any time,* if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. ß 706(a) (emphasis added). Thus, section 706 imposes two plainly expressed limitations upon a debtor's right to convert: the debtor (i) must not previously have converted the case; and (ii) must meet the eligibility requirements for the chapter to which he intends to convert, *see* 11 U.S.C. ß 706(d). With respect to a conversion to chapter 13, for example, the debtor must have a regular income, unsecured debts less than $307,675, and secured debts less than $922,975. *See id.* ß 109(e).

As always, first we must inquire whether the plain language of subsection 706(a) resolves the interpretive issue, and, if so, its manifest meaning must control. *See* In re BankVest Capital Corp., 360 F.3d 291, 297 (1st Cir.), *cert. denied,* --- U.S. ----, 124 S.Ct. 2874, 159 L.Ed.2d 776 (2004). At the outset it must be noted that subsection 706(a) is to be viewed in light of a fundamental canon of the Bankruptcy Code: a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims. *See* United States v. Mourad, 289 F.3d 174, 178 (1st Cir.2002) (noting that Bankruptcy Code §105(a) enables the bankruptcy court to "tak[e] any action or mak[e] any determination

necessary or appropriate to ... prevent an abuse of [the bankruptcy] process"). Whether or not the Bankruptcy Code §105(a) anti-abuse provision alone would warrant the bankruptcy court's decision to deny Marrama a subsection 706(a) conversion, that provision indeed looms large in determining whether Congress envisioned that subsection 706(a) be construed as withholding all discretion where the bankruptcy court is confronted with a patently abusive motion to convert:

> Those who seek the shelter of the bankruptcy code [must] not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated, "[t]he successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure."

Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir.1987) (citation omitted). Absent plain language to the contrary in subsection 706(a), therefore, we would be loathe indeed to disregard such an overarching legislative policy.

Turning to the particular language utilized in subsection 706 (a), we can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceedings. Subsection 706(a) simply provides that the debtor "may" convert. The word "may" has at least two connotations. It can simply denote that a debtor has the option to convert, or not

convert. On the other hand, "may" often suggests conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion. Thus, the phrase "may convert" reasonably may suggest that the right to convert is merely presumptive, and may be exercised only if the debtor meets the preconditions for eligibility established in Bankruptcy Code ß 109(e), or even then only in the absence of other exceptional circumstances. *See* In re Finney, 992 F.2d 43, 45 (4th Cir.1993) (holding subsection 706(a) right not "absolute," but subject to bad-faith exception); Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989); In re Kuntz, 233 B.R. 580, 585 (BAP 1st Cir.1999). In other words, the debtor "may" succeed in an attempted conversion, but not necessarily in all conceivable instances.

Although Congress's mere use of the word "may" might not be conclusive in itself as to the existence or scope of the bankruptcy court's discretionary authority to deny a conversion, the statutory interpretation proffered by the trustee is bolstered as well by a comparison between Bankruptcy Code ß 706(a) and ß 1307(b), for example, which provides that "[o]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court *shall dismiss* a case under this chapter." (Emphasis added.) Subsection 1307(b) demonstrates that Congress well understood how to draft statutory language which left no (or at least considerably less) discretion in the bankruptcy court to deny a chapter 13 debtor's request. [FN2] The fact that subsection 706(a) contains no such imperative language strongly suggests that it confers a more restricted right upon the debtor, and that the bankruptcy court presumptively retains its discretionary

prerogative to deny conversion in some circumstances. *See* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 346 (1st Cir. 2004) ("Congress's use of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight."). [FN3]

Similarly, use of the phrase "at any time" in subsection 706(a) simply means that the debtor may seek to convert at any time during the pendency of the bankruptcy case, or in other words, that no artificial time constraints should impede an election to convert. Obviously, however, the temporal permissiveness of the phrase "at any time" hardly equates to the more broad circumstantial permission which Congress could have conferred, for example, by employing a phrase such as "regardless of the circumstances." *See* In re Copper, 314 B.R. 628, 636-37 (BAP 6th Cir. 2004); In re Young, 269 B.R. 816, 822 (Bankr.W.D.Mo.2001); In re Starkey, 179 B.R. 687, 692 (Bankr.N.D.Okla.1995).

Marrama points to the second sentence in subsection 706(a), which provides that "[a]ny waiver of the right to convert a case under this subsection is unenforceable," as evidence that Congress intended that the debtor not be able to divest himself of the right to convert, even where he allegedly abuses the bankruptcy process. Once again, however, in context this sentence functions strictly as a consumer protection provision against adhesion contracts, whereby a debtor's creditors might be precluded from attempting to prescribe a waiver of the debtor's right to convert to chapter 13 as a non-negotiable condition of its contractual agreements. *See* In re Copper, 314 B.R. at 637; *cf.* Bankruptcy Code ß 522(e) (referring to a similarly-worded exemption waiver, which was made "unenforceable," as one

"executed in favor of a creditor"). Subsection 706(a) contains no intimation that the debtor should be accorded protection against his own willful misconduct, such as an intentional abuse of the bankruptcy process. *See* In re Starkey, 179 B.R. at 692 (noting that such debtor misconduct is more akin to an "estoppel," than a "waiver").

In construing subsection 706(a), it is important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition-- as distinguished from converting the case to chapter 13--based upon a showing of "bad faith" on the part of the debtor. *See* In re Cabral, 285 B.R. 563, 571-72 (BAP 1st Cir.2002); *see also* In re Alt, 305 F.3d 413, 418-19 (6th Cir.2002). We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance.

The plain language of subsection 706(a) in no sense undermines the presumptive authority of the bankruptcy court to take reasonable steps to thwart debtor abuse of the bankruptcy process. However, even assuming *arguendo* that subsection 706(a) were ambiguous, we would look to the statute's "historical context, its legislative history, and the underlying policies that animate its provisions." In re Weinstein, 272 F.3d 39, 48 (1st Cir.2001); *see* In re LAN Tamers, Inc., 329 F.3d 204, 210 (1st Cir.2003) (noting that court may rely upon legislative history to corroborate meaning derived from plain statutory language).

The present controversy over the meaning of subsection 706 (a) is traceable not to the plain language of subsection 706(a),

but largely to its legislative history, which describes the debtor's right to conversion as "absolute," or as a "matter of right":

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880.

The term "absolute" is problematic, if taken out of context, in that it implies that the debtor's conversion right is unconditional. We are not at liberty to take the term so literally, however, since subsections 706(a) and 109(e) make clear that numerous conditions exist which might defeat the debtor's motion to convert. *See* 9 Lawrence W. King, *Collier on Bankruptcy* ∂ 1017.05[1], at 1017-9 to 1017-10 (1998) ("Section 706(a) permits the debtor, as a matter of right, to convert a liquidation case to a case under chapter 11, 12, or 13 *if the case has not previously been converted from one of those chapters to chapter 7.*") (emphasis added). Therefore, in context the term "absolute" likely constitutes a recognition either that the debtor may convert *once* as a matter of right, but may not engage in successive conversions, or that the debtor's right to conversion cannot be waived by contract.

It is the pronounced policy of subsection 706(a) "that the debtor should always be given the opportunity to repay his

debts," H.R.Rep. No. 95-595, at 380, thus should be given one chance to effectuate a viable chapter 13 plan. It is plainly implicit in this legislative observation, however, that such an opportunity is to be accorded only to *honest* debtors. *See In re Spencer,* 137 B.R. 506, 512 (Bankr.N.D.Okla.1992) ("Where conversion to [chapter] 13 amounts to an attempt to escape debts rather than to repay them, the reason for the rule ceases--and there the rule ceases also."); *see also In re Marcakis,* 254 B.R. 77, 81 (Bankr.E.D.N.Y.2000). Nothing in the legislative history remotely negates nor undermines the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code.

Marrama advances two additional policy-related arguments. First, he notes the supposed irony that the bankruptcy reform legislation recently enacted by Congress aims to encourage more debtors to file chapter 13 petitions and thus undertake voluntary repayment of their debts, whereas the bankruptcy court here prematurely short-circuited his nascent attempt to do so. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, ß 215, 119 Stat. 23 (2005). This argument is unpersuasive. The language of subsection 706(a) remains unchanged under the new act, and Marrama has not suggested that there is any other specific Bankruptcy Code amendment which would affect our interpretation of subsection 706(a). Rather, the purport of the bankruptcy reform legislation is to compel some debtors presently eligible to file chapter 7 debt-liquidation cases to opt for the less debtor-friendly, debt-restructuring chapter 13 regime, thus making it impossible for those debtors to obtain an absolute discharge of their debts. *See In re Hill,* 328 B.R.

490, 500 (Bankr.S.D.Tex.2005) (discussing reform bill). A legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an ongoing scheme to retain his non-exempt assets from bona fide creditors.

***6** Finally, Marrama notes that the Code accords the bankruptcy court discretion to reconvert a chapter 13 case to chapter 7 at a subsequent stage in the proceedings where the debtor has acted in "bad faith," *see In re Copper,* 314 B.R. at 365, and therefore that subsection 706(a) should not be construed as authorizing a largely duplicative remedy. We disagree. First, it would ill serve general policies aimed at promoting the efficient administration of bankruptcy cases to insist that a bankruptcy court--already confronted with clear evidence of a debtor's bad faith--must indulge in the technical formality of converting the chapter 7 case to chapter 13, knowing full well that eventually the case must be reconverted by reason of that same evidence of bad faith. *See Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136, 1145 (1st Cir.1992) (noting "the important policy favoring efficient bankruptcy administration"). Absent some plausible policy justification for such pointless spinning of judicial wheels, we cannot construe subsection 706(a) as requiring it.

Moreover, these two remedies are neither inherently nor necessarily duplicative. Thus, for example, the bankruptcy court could invoke its power to reconvert a case, even though the debtor did not submit the subsection 706(a) conversion motion in bad faith, but subsequent to the conversion the

debtor engaged in bad-faith conduct which justified reconversion to chapter 7. Congress may well have envisioned--altogether reasonably--that the bankruptcy court could nip in the bud manipulative conduct on the part of a "bad faith" debtor at the moment of conversion, pursuant to subsection ß 706(a), rather than only after the case has been converted.

For all these reasons, we conclude that subsection 706(a) permits the bankruptcy court to deny a chapter 13 debtor's subsection 706(a) motion to convert where the court determines that the debtor engaged in bad faith conduct. We now turn to an assessment of the determination of bad faith made by the bankruptcy court.

B. *The Finding of "Bad Faith "*

Marrama maintains that the bankruptcy court erred in finding that he acted in "bad faith" by attempting to conceal assets from creditors by means of misrepresentations and material omissions of fact in his chapter 7 schedules. Marrama contends that (i) the schedules merely failed to disclose his recent transfer of the Maine property into the trust, yet did not conceal the existence of the property itself; (ii) the former omission was merely the result of scrivener error, with no intent to conceal; (iii) the statement, in Schedule B--that the res property had no value--was not false, notwithstanding its stated market value of $85,000, in that Marrama harbored a good-faith belief that the "spendthrift" nature of the trust prevented it from becoming property of the chapter 7 estate in the first instance; and (iv) the bankruptcy court determination is not supported by competent evidence, since the court did not convene an evidentiary hearing.

*7 As "good faith" is a fact-intensive determination to be made on a case-by-case basis, we review the instant finding as to "bad faith" for clear error only. *See In re Sullivan,* 326 B.R. 204, 212 (BAP 1st Cir.2005). A finding of fact cannot constitute clear error where competent record evidence supports it, nor is a reversal in order unless the court is "left with the definite and firm conviction that a mistake has been committed." *In re Hannigan,* 409 F.3d 480, 482 (1st Cir. 2005) (citation omitted). In assessing the totality of the circumstances, the bankruptcy court may consider, *inter alia,* (i) the accuracy of the debtor's financial statements; (ii) any other attempts by the debtor to mislead the bankruptcy court or manipulate the bankruptcy process; (iii) the type of debt sought to be discharged; (iv) whether the debt is dischargeable in chapter 7; and (v) the debtor's motivation in seeking to convert to chapter 13. *See Sullivan,* 326 B.R. at 212.

As the bankruptcy court determination that Marrama engaged in "bad faith" conduct is amply supported by the record, there can have been no clear error. The bankruptcy court is entitled to demand utmost good faith and honesty from debtors in the preparation of their schedules and statements of affairs. *See Hannigan,* 409 F.3d at 483. "The successful functioning of the bankruptcy [code] hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." *In re Tully,* 818 F.2d at 110. Thus, concealment of assets is a long-recognized ground for rejecting a motion to convert a case. *See, e.g., In re Kuntz,* 233 B.R. at 583 (collecting cases); *In re Porter,* 276 B.R. 32, 37-38 (Bankr.D.Mass.2002) (denying debtor's motion to convert, due to failure to disclose transfer of assets within one year of filing bankruptcy petition).

The instant case comports in all material respects with the classic profile of playing fast and loose with the bankruptcy process. First, Marrama engaged in prepetition transfers of valuable property with the acknowledged intention of insulating the transfers from creditors, submitted a chapter 7 petition, then omitted to mention these same assets and transfers in the bankruptcy schedules, presumably in the expectation that the chapter 7 trustee would not discover their concealment. As the effort at camouflage failed, Marrama moved to convert the case to chapter 13, predicated upon the uncorroborated assertion that he was receiving regular income sufficient to entitle him to protection under chapter 13. Conveniently, the instant conversion (which Marrama characterizes as an "absolute" matter of right impregnable to challenge either by the trustee or the bankruptcy court) would divest the chapter 7 trustee of any authority to act in behalf of the estate to safeguard its assets. *See* Bankruptcy Code ß. 348 (e), 11 U.S.C. ß 348(e). Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in "property of the estate," *as well as the concealed property.*

***8** Confronted with the profile presented by the instant case, the bankruptcy court readily could conclude that the Marrama disclosures demonstrated abundant indicia of intentional concealment. Question 10 unambiguously required Marrama to "[l]ist all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." Marrama responded: "None." The contention by counsel that Marrama simply forgot to include the transfer of the Maine

residence--which occurred a mere *seven months* before the chapter 7 petition filing--severely strains credulity. Not only was the Maine residence among Marrama's most valuable assets ($85,000), but Marrama conceded at the creditors' meeting that the transfer was made with the specific intent to avoid the claims of his creditors. *See, e.g., In re Weeden,* 306 B.R. 449, 459 (Bankr.W.D.N.Y.2004) (discrediting similar excuse by "intelligent, educated and financially sophisticated individual" for failure to disclose in Question 10 response a transfer proximate in time to the filing of the bankruptcy petition); *In re Carlson,* 231 B.R. 640, 656 (Bankr.N.D.Ill. 1999) (inferring fraudulent concealment where omitted transfer involved property transferred for no consideration and with specific intent to avoid creditors' claims against it). Further, by listing the value of the transferred property (or the trust *res*) as zero, Marrama made it less likely that the trustee would discover the preferential transfer, inasmuch as Marrama had made it appear that the trust may have never been funded.

The contention that Marrama honestly disclosed that the trust property value was zero strains credulity as well. Schedule B explicitly requires that the "current market value of debtor's interest in the property" be listed, rather than its value to the bankrupt estate. [FN4]

Finally, we reject the contention that, absent an evidentiary hearing, there was insufficient record support for the "bad faith" finding by the bankruptcy court. Marrama neither requested an evidentiary hearing, nor has he *yet* identified what additional material evidence could or would have been adduced at such a hearing. *See Cabral,* 285 B.R. at 577 (affirming, despite lack of evidentiary hearing on ground that

"[n]either counsel to the Debtor nor the Trustee indicated that there were facts in dispute or requested an opportunity to present evidence at the hearing").

Affirmed.

FN1. Moreover, in accompanying financial statements, Marrama claimed a homestead exemption in his Gloucester, Massachusetts residence. In affirming the bankruptcy court finding that Marrama had acted in bad faith, the Bankruptcy Appellate Panel ("BAP") noted that the homestead exemption appeared invalid on its face, since Marrama simultaneously claimed to be residing in Maine and to have received rental income from the Massachusetts property since May 2003, thus contradicting his assertion that it was a "residence" eligible for exemption. In the interim, however, the bankruptcy court has ruled that the Marrama homestead exemption claim is valid, *see In re Marrama,* 307 B.R. 332, 338-39 (Bankr.D.Mass.2004), hence we do not rely on this evidence in determining whether the bankruptcy court erred in finding bad faith.

FN2. Following the Marrama appeal, the Maine property was sold, *see In re Marrama,* 316 B.R. 418, 421-22 (BAP 1st Cir.2004) (holding that Marrama's power to revoke the trust became property of the chapter 7 estate, exercisable by the chapter 7 trustee), and Marrama was denied a chapter 7 discharge, *Citizens Bank of Mass. v. Marrama* (*In re Marrama*), No. 03-11987, 2005 WL 1106919, at *5 (D.Mass. May 9, 2005) (finding that Marrama had "intent to defraud" creditors, *see* Bankruptcy Code ß 727(a)(2)).

FN2. Our comparative analysis of subsections 706(a) and 1307(b) should not be construed as endorsing any particular interpretation of the latter section, such as one which would preclude the bankruptcy court from exercising its discretion to refuse to dismiss the chapter 13 case upon debtor's request. That issue is not before us to decide. *See, e.g., Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir.1987) ("[C]hapter 13 proceedings are wholly voluntary, and are subject to dismissal at any time at the debtor's request."). For present purposes, it suffices to note that the phrase "shall dismiss" is unquestionably a comparatively stronger imperative than "may convert."

FN3. The trustee points as well to Federal Rule of Bankruptcy Procedure 1017(f)(2), which requires that the debtor file a "motion" to convert under subsection 706(a), and to Rule 2002(a)(4), which requires that written notice of a hearing on such a motion be served 20 days prior to the hearing. The trustee argues that the fact that the debtor must file a "motion," rather than a mere "notice," suggests that the debtor's right to convert is conditional, not absolute. Ultimately, however, we find the applicability of Rules 1017(f)(2) and 2002(a)(4) inconclusive. Unquestionably, subsection 706(a) provides that the debtor's right to convert is at least conditioned upon some factual determinations, including the absence of any prior conversions to chapter 13, and the debtor's ability to meet the eligibility requirements to file a chapter 13 petition in the first instance, *see* 11 U.S.C. ß ß 706 (d); 109(e) (*e.g.*, unsecured debts less than $307,675).

Since parties in interest might contest such factual matters, at the very least the mere fact that the debtor must file a "motion" under ß 706(a) hardly demonstrates that Congress necessarily envisioned that the bankruptcy court might also condition conversion upon the debtor's "good faith." *See In re Croston,* 313 B.R. 447, 452-53 (BAP 9th Cir.2004). We would observe, however, that invocation of Rules 1017(f)(2) and 2002(a)(4) is in no sense incompatible with an interpretation which includes debtor "bad faith" among the conceivable contested matters to be addressed at a hearing.

FN4. We note as well that Marrama's asserted legal basis for stating that the Maine property never became part of the bankrupt estate is highly questionable. *See, e.g., Aylward v. Landry* (*In re Landry*), 226 B.R. 507, 510 (Bankr.D.Mass.2002) ("[A] spendthrift trust is ineffective against creditors if the settlor creates a trust for the settlor's own benefit and retains the power to amend, revoke or invade the principal of the trust."); *see also In re Marrama,* 316 B.R. at 421 (noting that, under Maine law, settlor retains power to revoke trust at any time, and this revocation power vests in the chapter 7 trustee).

--- F.3d ----, 2005 WL 2840634 (1st Cir.)

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No. 05-996

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In The Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS; MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question to be resolved in this Appeal is whether the Bankruptcy Court erred, as a matter of law, in denying the Debtor's Verified Notice of Conversion to Chapter 13.

The Bankruptcy Court's decision was affirmed by the Bankruptcy Appellate Panel for the First Circuit and the First Circuit Court of Appeals.

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BASIS OF APPELLATE JURISDICTION

This is an appeal from an order of the United States Bankruptcy Court for the District of Massachusetts, Eastern Division, denying the Debtor's Verified Notice of Conversion to Chapter 13. The Bankruptcy Court had jurisdiction over the Debtor's Case pursuant to 28 U.S.C. §1334. The Debtor appealed the Bankruptcy Court's order to the Bankruptcy Appellate Panel for the First Circuit (the "BAP") pursuant to 28 U.S.C §157(b). On September 9, 2004, the BAP issued a decision affirming the Bankruptcy Court's order denying the Debtor's Verified Notice of Conversion (the "BAP Decision"). On September 13, 2004, the Debtor filed a Motion for Rehearing pursuant to Fed. R. Bankr. P. 8015. On October 21, 2004 the BAP denied the Debtor's Motion for Rehearing. On November 1, 2004, the Debtor filed a Notice of Appeal of the BAP Decision pursuant to 11 U.S.C. §158(d) (the "Notice of Appeal"). The Notice of Appeal was filed under Fed. R. of App. P. 4(a) and 6(b)(2)(A)(1). On October 31, 2005, the First Circuit Court of Appeals affirmed the Bankruptcy Court's order. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Mark G. DeGiacomo, the duly appointed Chapter 7 Trustee (the "Trustee" or "Respondent") of the bankruptcy estate of Robert Louis Marrama (the "Debtor" or "Petitioner"), hereby submits this response to the Petition for a

Writ of Certiorari, which was filed by the Petitioner on January 30, 2006.[1]

On March 11, 2003, the Debtor filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (the "Petition Date"). On March 11, 2003, the Respondent was appointed as the Interim Chapter 7 Trustee for this bankruptcy estate.[2] On April 24, 2003, the Trustee commenced the meeting of creditors required by 11 U.S.C. §341(a) (the "Section 341 Meeting"). The Section 341 Meeting was continued several times at the request of the Debtor's counsel. The Debtor twice failed to attend continued sessions of the Section 341 Meeting.

As a result of the Debtor's testimony during the Section 341 Meeting, as well as the Trustee's review of certain documents, the Trustee determined that the Debtor had failed to disclose in his bankruptcy filings certain information that would lead the Trustee to assets of the bankruptcy estate.[3]

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[1] On March 6, 2006, the Respondent filed a Waiver of Response. On April 11, 2006, the Clerk of this Court wrote to the Respondent and requested that the Respondent file a response by May 11, 2006.

[2] In accordance with 11 U.S.C. §701, the Respondent became the permanent Chapter 7 Trustee of this bankruptcy estate when the meeting of creditors conducted pursuant to 11 U.S.C. §341(a) was concluded without a request for an election.

[3] These acts by the Debtor, in addition to other actions which came to light after the Bankruptcy Court hearing, formed the basis for the denial of the Debtor's discharge on April 28, 2004. Judge Hillman's denial of the Debtor's discharge was recently affirmed by the United States Court of Appeals for the First Circuit. *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 2006 U.S. App. LEXIS 9883 (1st Cir. 2006).

The Debtor failed to disclose the fact that approximately seven months prior to the Petition Date, he had transferred real estate he owned in York, Maine (the "Maine Property"), for no consideration, to the Bo-Mar Realty Trust (the "Trust"). The Declaration of Trust for the Trust indicated that (a) the Debtor was the holder of 100% of the beneficial interest of the Trust; (b) the Debtor's girlfriend, Josephine Bollettiero, was the sole trustee of the Trust; and (c) the Trust was revocable. Question 10 of the Statement of Financial Affairs asks the Debtor to:

> "list all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case."

The Debtor's response to Question 10 was "none," and nowhere else in the Statement of Financial Affairs did the Debtor disclose his transfer of the Maine Property.

The Debtor also failed to disclose the existence of an anticipated tax refund. On or about August 20, 2003, the Trustee was contacted by the Internal Revenue Service (the "IRS") and informed that the Debtor had filed an amended tax return during July of 2002 which asserted the Debtor's right to a tax refund in the amount of $11,194.00. Item 17 on Schedule B to the bankruptcy petition directs the Debtor to:

"identify other liquidated debts owing debtor including tax refunds." The Debtor's response to Item 17 on Schedule B was "none," and nowhere else did the Debtor disclose his entitlement to a tax refund. On September 5,

2003, the Trustee received a tax refund in the amount of $8,745.86 from the IRS (the "Tax Refund").

At the initial session of the Section 341 Meeting which was held on April 24, 2003, the Trustee indicated to the Debtor's counsel that the Trustee questioned the validity of the transfer of the Maine Property into the Trust, and in subsequent conversations with Debtor's counsel, the Trustee indicated that it was his opinion that the Maine Property was property of the bankruptcy estate recoverable by the Trustee for the benefit of the bankruptcy estate. Having been so advised the Debtor filed the Verified Notice of Conversion to Chapter 13 on June 23, 2003.[4]

On July 1, 2003, the Respondent filed his Chapter 7 Trustee's Opposition to Debtor's Verified Notice of Conversion to Chapter 13. On August 27, 2003, Judge Hillman conducted a hearing concerning the Debtor's Verified Notice of Conversion (the "Hearing"). During the Hearing, Judge Hillman was presented with the above failures to disclose[5] as well as the statement by Doreen Solomon, the standing Chapter 13 Trustee for the Eastern Division of the District of Massachusetts, that the Debtor would not be able to confirm a Chapter 13 Plan. After considering all

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[4] It is the Respondent's contention that the Debtor attempted to convert his case solely because the Trustee had indicated he would pursue the Maine Property for the bankruptcy estate not, as the Debtor contends, because he was suddenly employed by his brother.

[5] The failure to disclose the transfer of the Maine Property and the failure to disclose the existence of the Tax Refund were the primary issues raised by the Respondent during the Hearing. Since the Hearing, several other acts and omissions of the Debtor have come to light which would have provided further support for the denial of the Verified Notice of Conversion to Chapter 13.

of the facts presented, the Bankruptcy Court entered an Order denying the Debtor's Verified Notice of Conversion.

ALLOWANCE OF THE PETITION

Although the Respondent is of the opinion that the First Circuit correctly upheld Judge Hillman's decision that a Debtor's request to convert a case from Chapter 7 to Chapter 13 may be denied due to the bad faith conduct of the Debtor, the Respondent cannot disagree with the Petitioner's position that there is a split of authority among courts which have considered this issue.[6]

11 U.S.C. §706(a) provides: "The debtor may convert a case under this chapter to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title." The Debtor asserts that the plain language of this statute as well as its legislative history compels the finding that the statute requires a court to allow a debtor to convert his case from Chapter 7 to Chapter 13 regardless of the debtor's conduct. The Trustee asserts, and the First

[6] The BAP Decision cites the following comment by the Honorable David S. Kennedy "[i]t is somewhat difficult to determine at this time in the development of the decisional law which view actually represents the majority or minority of courts, especially considering the fact that conflicting reported opinions substantiating the statutory right as an absolute one or qualified right seemingly appear in almost every new bankruptcy advance sheet." David S. Kennedy, "Current Controversies Centering Around a Debtor's Statutory and Procedural Right to Convert an Originally Filed Chapter 7 Code and Related Matters," *18th Annual Current Developments in Hot & Emerging Areas*, Commercial Law League of America, October 16, 2003 (citing *In re Ponzini*, 277 B.R. 399, 404 n. 3 (Bankr. E.D. Ark. 2002).

Circuit held, that the plain language of the statute provides the bankruptcy court with discretion when deciding whether to convert a case to Chapter 13 and that the bad faith conduct of a debtor can justify denial of a conversion request. Despite the disagreement of the parties on the proper outcome of this case, the parties agree that a debtor's ability to convert his or her Chapter 7 case to Chapter 13 is an important question that implicates the rights of both debtors and creditors in the bankruptcy courts.[7] The recent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 does not impact or resolve this question.

The Circuit Courts appear to be split on the issue of conversion. In addition to the First Circuit in this case, two other Circuit Courts of Appeals have held that a debtor's right to convert under 11 U.S.C. §706(a) is not absolute. The Fourth Circuit in *In re Finney*, 992 F.2d 43 (4th Cir. 1993), held that a debtor's right to convert under 11 U.S.C. §706(a) can be denied if the debtor's conduct during the Chapter 7 proceedings is egregious. The Sixth Circuit Court of Appeals in *Copper, et al. v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005), held that in light of the permissive language of the statute and common sense, conversion may be denied based on the debtor's lack of good faith.

The decision in *In re Martin*, 880 F.2d 857 (5th Cir. 1989) has been cited as authority for both sides of the

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[7] The importance of this issue is evidenced by the fact that *amicus curiae* briefs were filed with the First Circuit by the National Association of Bankruptcy Trustees (in support of the Respondent) and the National Association of Consumer Bankruptcy Attorneys (in support of the Petitioner).

issue. *See In re Carrow*, 315 B.R. 8 (N.D. N.Y. 2004) (cited for the proposition that a debtor's right to convert is absolute) and *In re Lesniak*, 208 B.R. 902 (Bankr. N.D. Ill. 1997) (indicating that a careful reading of *Martin* suggests that the debtor's right to convert is only absolute in the absence of extreme circumstances). However, last year the Fifth Circuit Court of Appeals had an opportunity to revisit its *Martin* decision, and in an unpublished decision stated that "the statutory language makes it clear that the right to convert is absolute and unqualified." *Pequeno v. Schmidt (In re Pequeno)*, 126 Fed. Appx. 158, 162 (5th Cir. 2005).

The Bankruptcy Appellate Panels and District Courts have also reached divergent conclusions with respect to the issue of a debtor's right to convert from Chapter 7 to Chapter 13. These decisions include *Cabral v. Shamban (In re Cabral)*, 285 B.R. 563 (1st Cir. BAP 2000) (denial of conversion is warranted in extreme circumstances); *In re Carrow*, 315 B.R. 8 (the right to convert under 11 U.S.C. §706(a) is absolute based on the plain language in the statute and legislative history, and issues of bad faith are more properly addressed subsequent to the conversion at the confirmation stage); *In re Pakuris*, 262 B.R. 330 (E.D. Pa. 2001) (in deciding a motion to convert under 11 U.S.C. §706(a), the "totality of the circumstances" should be considered); *In re Wampler*, 302 B.R. 601 (Bankr. S.D. Ind. 2003) (a bankruptcy court has the discretion to deny a motion to convert under 11 U.S.C. §706(a) upon a showing of bad faith or where conversion is sought for an illegitimate purpose); *Croston v. Davis (In re Croston)*, 313 B.R. 447 (9th Cir. BAP 2004) (debtor cannot be barred from one-time right to convert for reasons other than as stated in 11 U.S.C. §706, a prior disqualifying conversion or

ineligibility for relief under the particular chapter); *Miller v. United States Trustee, et al. (In re Miller)*, 303 B.R. 471 (10th Cir. BAP 2003) (plain meaning of statute supports debtor's right to convert); *In re Gallagher*, 283 B.R. 604 (Bankr. M.D. Fla. 2002) (in determining whether to deny a debtor's motion to convert, courts should consider the basic policy aim of a Chapter 13 case; the debtor's motivation to seek conversion; and the reason why the debtor did not initially seek relief under Chapter 13).

CONCLUSION

While the Respondent believes that the First Circuit Court of Appeals correctly ruled that the plain meaning of 11 U.S.C. §706 gives the bankruptcy court discretion to deny a debtor's request to convert a Chapter 7 case to Chapter 13, the Respondent cannot disagree with the Petitioner's contention that there is a split of authority on this matter and that conversion from Chapter 7 to Chapter 13 is an important issue of bankruptcy law.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 30, 2006
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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES BANKRUPTCY COURT DISTRICT OF MASSACHUSETTS (BOSTON) BANKRUPTCY CASE #: 03-11987

03/11/2003	Voluntary Chapter 7 Petition (Filing Fee $ 200.00 Rcpt # 494855) missing documents: Statement of Intent due by 4:30 4/10/03 (kpm) Additional attachment(s) added on 10/7/2003. CORRECTIVE ENTRY: Incorrect PDF was Attached. Correct PDF Now Attached. (Entered: 03/12/2003)
06/23/2003	Verified Notice Of Conversion To Chapter 13 Filed by Debtor Robert Louis Marrama. Verification. (fac,) (Entered: 06/25/2003)
07/01/2003	Opposition by Trustee Mark G. DeGiacomo Re: 50 Verified Notice Of Conversion To Chapter 13 Filed by Debtor Robert Louis Marrama. (mkp) (Entered: 07/01/2003)
07/22/2003	Opposition by Creditor Citizens Bank of Massachusetts Re: Debtor's 50 Verified Notice Of Conversion To Chapter 13. c/s. (mkp) (Entered: 07/31/2003)
08/11/2003	Debtor Robert Louis Marrama's Amended Schedules I and J. (mkp) (Entered: 08/20/2003)
08/11/2003	Notice Filed by Debtor Robert Louis Marrama 71 Amendment To Schedules I And J. c/s.. (mkp) (Entered: 08/20/2003)

Appendix A

08/11/2003	Debtor Robert Louis Marrama Response To: 54 Opposition Of Trustee Mark G. DeGiacomo To Debtor's 50 Verified Notice Of Conversion To Chapter 13. c/s..(mkp) (Entered: 08/20/2003)
08/27/2003	Order Dated 8/27/2003 Denying Debtor's Robert Louis Marrama 50 Verified Notice Of Conversion To Chapter 13. CONVERSION DENIED. Finding and Conclusions dictated at close of hearing incorporated by reference. (mkp) (Entered: 08/29/2003)
08/29/2003	Notice of Appeal. Fee Amount $105 Filed by Debtor Robert Louis Marrama (RE: 82 Order on Motion to Convert Case To Chapter 13). Appellant Designation due by 9/8/2003. Complied Records Due by 9/23/2003. Transmission of Designation Due by 9/29/2003. (Baker, David) (Entered: 08/29/2003)
08/29/2003	Receipt of filing fee for Notice of Appeal(03-11987) [appeal,ntcapl] (105.00). Receipt Number 0101B255273, amount $ 105.00. (U.S. Treasury) (Entered: 08/29/2003)
09/02/2003	Appellant Designation of Contents For Inclusion in Record On Appeal and Appellant's Statement of Issues Filed by Debtor Robert Louis Marrama (RE: 83 Notice

of Appeal,). Appellee designation due by 9/12/2003. (Baker, David) (Entered: 09/02/2003)

09/08/2003 Chapter 7 Trustee's Supplemental Designation of Record On: 87Appellant Designation of Contents For Inclusion in Record On Appeal and Appellant's Statement of Issues Filed by Debtor Robert Louis Marrama (RE: 83 Notice of Appeal. Appellee designation due by 9/18/2003. (mkp) (Entered: 09/16/2003)

09/10/2003 Citizens Bank of Massachusetts Designation of Contents of Additional Items To Be Included In The Record RE: 83 Notice of Appeal. c/s.. (mkp) (Entered: 09/16/2003)

12/23/2005 JUDGMENT By Bankruptcy Appellate Panel Judges Lamoute, Vaugh and Carlo, Upon consideration whereof, and in accordance with the Opinion entered on September 9, 2005, it is now hereby ORDERED AND ADJUDGED that the bankruptcy court's August 27, 2003 order denying the Debtor's Conversion to Chapter 13 is AFFIRMED. (mkp) (Entered: 12/23/2005)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT CASE NO. 04-0001

9/9/04	OPINION ISSUED by Lamoutte, Vaughn, and Carlo, Bankruptcy Appellate Panel Judges. Published. (cc\cl) [04-1] (turn) [04-1]
9/9/04	JUDGMENT FILED AND ENTERED. This cause came to be heard from the United States Bankruptcy Court for the District of Massachusetts. Upon consideration whereof, and in accordance with the Opinion entered on September 9, 2004, it is now hereby ORDERED AND ADJUDGED that the bankruptcy court's August 27, 2003 order denying the Debtor's Verified Notice of Conversion to Chapter 13 is AFFIRMED. (cc\cl). (turn) [04-1]
9/14/04	Appellant's, Robert Louis Marrama Motion for Rehearing. Filed by Attorney, David G. Baker. c\s (pam) [04-1]
9/23/04	Opposition of Chapter 7 Trustee/Appellee, Mark G. DeGiacomo to Appellant's Motion for Rehearing [152478-1]. memorandum of law in support and c/s attached. (pam) [04-1]
10/21/04	Lamoutte, Vaughn, Carlo, U.S. Bankruptcy Appellate Panel Judges. ORDER DENYING APPELLANT'S MOTION FOR REHEARING..

Appendix B

11/1/04	Notice of Appeal. (Case appealed to First Circuit by Appellant, Robert Louis Marrama *Fee not Paid). [04-1] (pam) [04-1]
11/3/04	Notice of filing of appeal to Circuit Court sent to Massachusetts (Boston) Bankruptcy Court. (pam) [04-1]
11/3/04	Original Record sent to First Circuit on 11/3/04. (pam) [04-1]
11/4/04	1st Circuit Court of Appeals $255.00 fee paid. *Forwarded to 1st Circuit Court of Appeals 11/4/04. (pam) [04-1]
11/4/04	Received 1st Circuit Court of Appeals Case Number. 04-9009 (pam) [04-1]
11/21/05	Received 1st Circuit Court of Appeals Mandate. Disposition: affirmed. [04-1] (jenb) [04-1]
11/30/05	BAP Mandate Issued. Notice of entry of judgment to parties, regional U.S. Trustee and Bk. Clerk. , FILED (cc\cl). 10/12/04. (jenb) [04-1]

APPENDIX C — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT CASE NO. 04-9009

11/4/04 CIVIL CASE docketed. Opening forms sent.Notice of Appeal filed by Appellant Robert Louis Marrama. Appearance form due 11/18/04. Docketing Statement due 11/18/04. Transcript Report/Order due 11/18/04. [04-9009] (bety)

11/4/04 RECORD filed: 1 volume(s) consisting of docket entries 1-28. NO Transcript(s) filed. [926430-1] [04-9009] (bety)

11/8/04 APPEARANCE filed by Olga Bogdanov for Appellee Mark G. DeGiacomo. [927904-1] [04-9009] (bety)

11/9/04 APPEARANCE filed by Michael A. Wirtz for Appellee Citizens Bank of Ma. [928294-1] [04-9009] (bety)

11/9/04 APPEARANCE filed by David G. Baker for Appellant Robert Louis Marrama. [928295-1] [04-9009] (bety)

12/30/04 BRIEF filed by Appellant Robert Louis Marrama. Length: 27 pages, Copies: 10, delivered by mail. Certificate of service date 12/29/04. [946737-1] Appellee brief due 1/31/05. [04-9009] (laur)

Appendix C

12/30/04 MOTION filed by Robert Louis Marrama to waive filing of appendix, Certificate of service dated 12/29/04. [04-9009] (laur)

1/3/05 MOTION filed by Debtor Robert Louis Marrama for leave to cite additional authority. Certificate of service dated 12/30/04. [04-9009] (frnk)

1/6/05 ORDER ENTERED: Appellant's motion for waiver of the requirement of an appendix is granted. [04-9009] (laur)

1/10/05 SUPPLEMENTAL AUTHORITY pursuant to FRAP 28j filed by Appellant Robert Louis Marrama. Certificate of Service 12/30/04. [04-9009] (laur)

1/10/05 MOTION filed (via fax) by Appellee Citizens Bank of Massachusetts and Mark G. DeGiacomo to strike the portions of appellant's brief that are not part of the record and statment in support thereof. Certificate of service dated 1/10/05. [04-9009] (frnk)

1/19/05 RESPONSE filed by Appellant Robert Louis Marrama to motion to strike portion of a brief. [948469-1] Certificate of service dated 1/17/05. [951580-1] [04-9009] (heid)

1/26/05 ORDER entered by Judge Jeffrey R. Howard. Appellees' motion to strike is noted, but denied;

however, assertions which are not supported by the record will be disregarded. [04-9009] (heid)

1/31/05 BRIEF filed by Appellee Mark G. DeGiacomo. Length: 19 pages, Copies: 19, delivered by mail. Certificate of service date 1/28/05. [955107-1] [04-9009] (frnk)

1/31/05 Non-Conforming Brief filed by Appellee Citizens Bank of Massachusetts. Certificate of service dated 1/31/05. (heid)

2/7/05 BRIEF filed by Appellee Citizens Bank of Massachusetts. Length: 18 pages, Copies: 10, delivered by hand. Certificate of service date 2/7/05. Reply brief due 2/21/05. [04-9009] (heid)

2/9/05 ATTORNEY Jack Mikels for Appellee Citizens Bank of Massachusetts added to case. [04-9009] (heid)

2/9/05 APPEARANCE filed by Jack Mikels for Appellee Citizens Bank of Massachusetts. [958955-1] [04-9009] (heid)

10/31/05 OPINION filed. Judge Jeffrey R. Howard, Senior Judge Conrad K. Cyr and Senior Judge Norman H. Stahl signed Senior Judge Conrad K. Cyr, Authoring Judge PUBLISHED [1053713-1] [04-9009] (laur)

Appendix C

10/31/05 JUDGMENT entered by Judge Jeffrey R. Howard, Senior Judge Conrad K. Cyr and Senior Judge Norman H. Stahl: This cause came on to be heard on appeal from the Bankruptcy Appellate Panel for the First Circuit, and was argued by counsel. Upon consideration whereof, it is now here ordered, and decreed as follows: The judgment of the Bankruptcy Appellate Panel is affirmed. [1053714-1] [04-9009] (laur)

11/21/05 MANDATE ISSUED. [04-9009] (laur)

12/8/05 ERRATA SHEET to opinion filed. The opinion of this Court issued on October 31, 2005, is amended as follows: Cover sheet, appearances: l.2: "DeGiamomo" should be changed to "DeGiacomo"; ll.7-9: Should be replaced with the following: "Lynne F. Riley, with whom Riley & Esher, were on brief for Amicus Curiae, National Association of Bankruptcy Trustees." ll.10-14: Insert the following: "Gary Klein, with whom Roddy, Klein & Ryan, and John Rao, National Consumer Law Center, were on brief for Amicus Curiae, National Association of Consumer Bankruptcy Attorneys." [1053713-1] [1067231-1] [04-9009] (turn)

12/13/05 ERRATA SHEET to opinion filed. [1053713-1] [1068949-1] The opinion of this court issued October 31, 2005, should be amended as follows: On page 15, line 8, change "chapter 13" to "chapter 7" [04-9009] (turn)

Appendix C

12/15/05 RECORD consisting of documents 1-28 returned to originating court. (cand)

2/13/06 U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on [1090320-1] 01/30/06. Supreme Court case number: 05-0996. [04-9009] (laur)

APPENDIX D — VERIFIED NOTICE OF CONVERSION TO CHAPTER 13 DATED JUNE 23, 2003

UNITED STATES BANKRUPTCY COURT EASTERN DIVISION, DISTRICT OF MASSACHUSETTS

Chapter 7
Case No. 03-11987-WCH

In re:

Robert Louis Marrama,

Debtor

VERIFIED NOTICE OF CONVERSION TO CHAPTER 13

NOW COMES Robert Louis Marrama, debtor in the above captioned matter, and gives notice of conversion of the above captioned case to one under Chapter 13, and in support of his notice states that the case has not been converted from another chapter previously, and that he is qualified to be a debtor under Chapter 13.

June 23, 2003

Respectfully submitted
Robert Louis Marrama
By his attorney,

s/ David G. Baker
David G. Baker, Esq.
105 Union Wharf
Boston, MA 02109
617.367.4260
BBO# 634889

Appendix D

VERIFICATION

I, Robert Louis Marrama, hereby verify that I have read the above Notice and that the same is true and correct to the best of my knowledge and belief, and that I understand the relief available and my obligations under Chapter 13 and desire that my case be converted.

s/ Robert Louis Marrama
Robert Louis Marrama

APPENDIX E — CHAPTER 7 TRUSTEE'S OPPOSITION TO DEBTOR'S VERIFIED NOTICE OF CONVERSION TO CHAPTER 13 DATED JUNE 24, 2003

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS,
EASTERN DIVISION

CHAPTER 7
CASE NO. 03-11987-WCH

In re:

ROBERT LOUIS MARRAMA,

Debtor.

CHAPTER 7 TRUSTEE'S OPPOSITION TO DEBTOR'S VERIFIED NOTICE OF CONVERSION TO CHAPTER 13

NOW COMES Mark G. DeGiacomo, the duly-appointed Chapter 7 Trustee of the estate Robert Louis Marrama (the "Trustee") and submits this Opposition to the Debtor's Verified Notice of Conversion To Chapter 13. In support of this Opposition, the Trustee states the following:

I. FACTS

1. On March 11, 2003, Robert Louis Marrama (the "Debtor") filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code (the "Petition Date").

Appendix E

2. On March 11, 2003, Mark G. DeGiacomo was appointed as the Chapter 7 Trustee of the bankruptcy estate of the Debtor.

3. On April 24, 2003, the Trustee commenced the Section 341 meeting of creditors (the "Section 341 Meeting"). The Section 341 Meeting has been continued to July 17, 2003.

4. During the Section 341 Meeting, the Debtor testified that in August of 2002, he transferred real property he owned in York, Maine (the "Maine Property") into the Bo-Mar Realty Trust (the "Trust"). The Declaration of Trust for the Trust indicates that (a) the Debtor is the 100% beneficiary of the Trust, (b) Josephine Bollettiero, who the Debtor identified as his girlfriend, is the trustee of the Trust, and (c) the Trust is revocable and purports to be a spendthrift trust.

5. The Debtor has indicated that the Maine Property is the only asset owned by the Trust. The Debtor estimated that the value of the Maine Property is approximately $220,000.00. He also indicated that it is encumbered by a mortgage which secures a $134,000.00 obligation.

6. The Debtor asserted at the Section 341 Meeting that the purpose of transferring the Property into the Trust was to "try to protect it."

7. The Debtor did not disclose the transfer of the Maine Property in response to Question 10 of the Statement of Financial Affairs or anywhere else in his bankruptcy petition.

Appendix E

8. The Debtor also testified at the Section 341 Meeting that he is not living in the Gloucester, Massachusetts property (the "Massachusetts Property") in which he claims a homestead exemption. The Debtor testified that the Massachusetts Property is a rental property from which he derives a rental income.

9. As a result of the Debtor's testimony during the Section 341 Meeting, the Trustee became aware of the existence of the Maine Property and its transfer approximately seven months prior to the Petition Date. The Trustee also became aware of the potential of recovering the value of the homestead exemption for the benefit of the Debtor's bankruptcy estate. The Trustee continued the Section 341 Meeting to July 17, 2003 in order to investigate the statements made by the Debtor during the examination and the information in the Debtor's Schedules and Statement of Affairs.

10. At the Section 341 Meeting, the Trustee indicated to Debtor's counsel that he questioned the transfer of the Maine Property into the Trust. In subsequent conversations with Debtor's counsel, the Trustee indicated that it was his opinion that the Maine Property was property of the estate recoverable by the Trustee for the benefit of the bankruptcy estate.

11. On June 5, 2003, the Trustee filed his Motion to Extend Deadline for Objecting to the Debtor's discharge which was allowed by the Court on June 12, 2003.

Appendix E

II. ARGUMENT

a. The Debtor's Request For Conversion Is Made in Bad Faith With An Intent To Prevent The Trustee's Recovery On Behalf Of The Estate Of (i) The Value Of The Homestead Exemption and (ii) A Fraudulent Transfer.

12. Section 706(a) of the Bankruptcy Code provides: "The debtor may convert a case under this chapter to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title."

13. However, a debtor's right to convert to a Chapter 13 is not unlimited and may be denied in extreme circumstances. *In re Kuntz*, 233 S.R. 580 (1st Cir. BAP 1999); *Cabral v. Shamban (In re Cabral)*, 285 B.R. 563 (1st Cir. BAP 2000).

14. Bankruptcy Courts have denied the request for conversion based on a finding of lack of good faith and where conversion would result in abuse of process. *Kuntz* at 583. See also *In re Porter*, 276 B.K. 32 (Bankr. D. Mass. 2002) (misrepresentations in debtor's schedules, tenuous nature of plan and debtor's filing of motion to convert to avoid pending adversary proceedings were sufficient circumstances to deny conversion); *In re Jeffrey*, 176 *B.R. 4* (Bankr. D. Mass. 1994) (right of conversion is not unlimited and may be denied where debtor has acted in bad faith or where conversion would result in an abuse of process or other gross inequity).

Appendix E

15. The Debtor filed this Verified Notice of Conversion To Chapter 13 after the Trustee indicated to Debtor's counsel that he views the Maine Property to be property of the bankruptcy estate recoverable by the Trustee on behalf of the bankruptcy estate of the Debtor.

16. The Trustee will also obtain a broker's opinion of value of the Massachusetts Property to determine whether any equity exists for the bankruptcy estate in the Massachusetts Property. If the Trustee determines that equity exists in the Massachusetts Property, the Trustee will object to the Debtor's exemption on the basis that the Debtor does not reside and has no intention of residing in the Massachusetts Property.

17. In this case, the Debtor's request for conversion is made in bad faith, and conversion of the case would constitute an abuse of the bankruptcy process.

WHEREFORE, the Trustee requests that this honorable Court issue an Order denying the Debtor's Conversion to Chapter 13.

Appendix E

Respectfully submitted,
MARK G. DEGIACOMO,
CHAPTER 7 TRUSTEE
OF THE ESTATE OF
ROBERT LOUIS MARRAMA,
By his attorneys,

s/ Olga L. Bogdanov
Mark G. DeGiacomo, Esq.
(BBO# 118170)
Olga L. Bogdanov, Esq.
(BBO# 644879)
Murtha Cullina LLP
99 High Street
Boston, MA 02110
(617) 457-4000 Telephone
(617) 482-3868 Facsimile

Dated: June 24, 2003

APPENDIX F — CITIZENS BANK OF MASSACHUSETTS, OPPOSITION TO DEBTOR'S VERIFIED NOTICE OF CONVERSION TO CHAPTER 13 DATED JULY 21, 2003

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 7
Case No. 03-11987-WCH

In Re

ROBERT LOUIS MARRAMA,

Debtor

CITIZENS BANK OF MASSACHUSETTS, OPPOSITION TO DEBTOR'S VERIFIED NOTICE OF CONVERSION TO CHAPTER 13

Citizens Bank of Massachusetts, (the "Bank") opposes the Debtor's Verified Notice of Conversion to Chapter 13 as the request for conversion lacks good faith and would result in abuse of process. In further support thereof, the Bank states the following:

I. Factual Background

1. On March 11, 2003, the Debtor, Robert Louis Marrama (the "Debtor") filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code claiming no assets.

Appendix F

2. The Debtor is the guarantor of certain unpaid loan obligations due to the Bank by the Debtor's defunct company RLM Flooring, Inc. ("RLM") in excess of $300,000.[1]

3. Prior to this case, the Bank commenced a civil action against the Debtor and RLM in the Massachusetts Superior Court to enforce collection of its loans and obtain equitable relief to seize the business records and manage the collection of RLM's receivables so that the collections could be applied to the outstanding balance due.[2]

4. While the Bank was seeking equitable relief in the state court action the Debtor participated in improper, and possibly illegal, activity which ultimately drained the company's assets and prevented the Bank from auditing

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1. More specifically, the Debtor guaranteed RLM's loan obligations under a written Commercial Guaranty of Performance dated February 28, 2001, a Guaranty dated October 24, 1995, and a Reaffirmation of Guaranty dated June 14, 2000. RLM's obligations include a Promissory Note evidencing a revolving line of credit in the original principal amount of $250,000.00 and a Promissory Note evidencing a demand loan in favor of the Bank's predecessor, USTrust, in the original principal amount of $20,000, as amended by a Loan Modification Agreement dated June 14, 2000.

2. An equitable order was necessary because the receivables which the Defendants were collecting were being paid to unsecured creditors and to RLM's debt "consultants" which consisted of a disbarred attorney (Leon Aronson) and a CPA who is currently being criminally prosecuted by the Attorney General for insurance fraud (Gary K. Baker). The CPA and his assistant took RLM's books and records and refused to produce them or appear for deposition in response to the Bank's multiple subpoenas.

RLM's books and records. Debtor's misconduct included concealing the company's computer records from the Bank's auditor and falsely reporting them to be stolen[3]; diverting valuable contracts and receivables to his brother's company where Debtor now works[4]; clearing out a bank account after being notified on a pending hearing for a bank account attachment[5]; evading the Bank's discovery by alleging to be too fragile to undergo deposition and then asserting the fifth amendment privilege in response to written interrogatories relating to dissipated assets[6]; filing frivolous criminal charges

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3. On the morning that Bank was scheduled to conduct an audit of RLM, Debtor reported RLMs computer server had been stolen and all backup accounting records and programs disappeared. It was later discovered by the Bank's forensic experts that the server was never missing but that the computer which was purportedly stolen was one of the office hard drives. Although the Defendants accused RLM's controller for taking the computer criminal charges were never pursued against her.

4. Debtor's Schedule I reports that he is currently employed by Capital Carpet and Flooring earning $8600.00 per month. Capital Carpet and Flooring is flooring business owned by Debtor's brother Mark Manama.

5. More than $20,000 was drained from the account: $14,500.00 was given to his attorney Jack Cullen, who was previously served with the Bank's attachment motion and $6,800.00 was supposedly a "loan" from the Debtor to one of RLM's highest paid employees. Debtor's schedules state that Attorney Cullen has an $82,000 claim against him for legal fees.

6. Witnesses in the State Court action swore that in the final months that RLM was in business, Debtor was dealing in large sums of cash. In one instance, Debtor was reportedly carrying approximately $100,000 in cash in a hand-held safe.

against two of the Bank's vice presidents and its attorney in an effort to gain settlement leverage in the case[7]; and refusing to produce financial disclosures in response to a document request that was scheduled for a hearing to compel prior to Debtor's filing of this action.[8]

5. In this case, the Debtor also appears to have acted without good faith in filing his Chapter 7 Schedules and Statement of Affairs as examination at the First Meeting of Creditors discovered that Debtor's Schedule I failed to disclose that he was earning an additional income of $2,150.00 for rental property that he owns in Gloucester Massachusetts[9] and Debtor's Statement of Financial Affairs

7. Debtor filed a criminal complaint of breaking and entering in the day time and malicious destruction of property on the day the Bank took possession of RLM's office under order of the Superior Court. During a mediation proceeding in the civil suit, Debtor's attorney, Jack Cullen, instructed Debtor in front of numerous witnesses not to dismiss the charges because they had a settlement advantage. The charges were dismissed in the criminal court on the day of the show cause hearing.

8. All of these actions will be the basis of the Bank's objection to discharge in this case.

9. Under examination at the First Meeting of Creditors, Debtor admitted that he moved out of the Gloucester Property months before filing this case and reported that he earned a monthly rental income of $ 1,500.00 for the upstairs unit and $650.00 for the downstairs. Despite the fact that he was not residing in the property nor intends to in the future, Debtor moved to avoid the Bank's $250,000 real estate attachment that was awarded in the state court action under an inapplicable homestead exemption claim. On May 28, 2003, the Court sustained the Bank's objection to the Debtor's homestead exemption.

and Schedules also did not disclose that, less than a year ago, he transferred real property he owns in York Maine into a Realty Trust to which his girlfriend, Josephine Bollettiero, is trustee and he is sole beneficiary.[10]

6. The Debtor has also intentionally hindered the Bank's efforts to ask questions regarding his financial affairs and property by: (i) refusing to appear for the Rule 2004 examination with subpoenaed documents as scheduled under Court Order on May 12, 2003;[11] (ii) failing to appear for the second continued Creditor's Meeting that had been continued by agreement of the parties to June 16; and, (iii) showing up over an hour and a half late for the third continued Creditor's Meeting on July 15, without requested documentation and unprepared to provide responses to substantive questions relating to an accounting of more than $152,000.00 cash that he netted from refinancing the Maine and Gloucester properties last summer.

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10. At the First Meeting of the Creditor's Debtor admitted that the conveyance of the Maine property was fraudulent as it lacked consideration and was put in the Trust to "protect it". According to the Debtor, the Maine property was the only asset owned by the Trust.

11. Despite having no Protective Order, the Debtor and Debtor's counsel refused to appear claiming that the Debtor "declines to answer any questions [the Bank] may have and he intends to exercise his Fifth Amendment right as he did in the state court litigation..." A copy of the letter from Debtor's counsel refusing to appear is attached hereto as Exhibit "A".

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7. A fourth continued Creditor's Meeting is scheduled for August 21, 2003 and the deadline for objecting to the Debtor's discharge has been extended by motion to the Court to August 22, 2003.

8. Debtor filed a Verified Notice of Conversion to Chapter 13 on June 23, 2003, before the Court allowed the Bank's motion to extend the objection date to discharge.

II. Argument

Section 706(a) of the Bankruptcy Code provides: "The debtor may convert a case under this chapter to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title." However, Debtor's right to convert from a Chapter 7 to a Chapter 13 is not unlimited and may be denied in extreme circumstances. *In re Kuntz*, 233 B.R. 580 (1st Cir. BAP 1999); *Cabral v. Shamban (In re Cabral)*, 285 B.R. 563 (1st Cir. BAP 2000). Requests for conversion are denied where there is a lack of good faith and where conversion would result in abuse of process. *Kuntz* at 583; *see also In re Porter*, 276 B.R. 32 (Bankr.D.Mass.2002) (misrepresentations in debtor's schedules, tenuous nature of plan and debtor's filing of motion to convert to avoid pending adversary proceedings were sufficient circumstances to deny conversion); *In re Jeffrey*, 176 B.R. 4 (Bankr.D.Mass. 1994) (right of conversion is not unlimited and may be denied where debtor has acted in bad faith or where conversion would result in an abuse of process or other gross inequity). The timing of the Debtor's Verified Notice of Conversation to Chapter 13 is highly suspect in light of the Debtor's failure to fully and voluntarily

disclose his financial condition. Debtor's request to convert from a no asset Chapter 7 is made in bad faith and, if allowed, would constitute an abuse of the bankruptcy process.

III. Conclusion

WHEREFORE, Citizens Bank of Massachusetts respectfully requests that this Honorable Court deny Debtor's Conversion to Chapter 13.

Respectfully submitted
CITIZENS BANK
OF MASSACHUSETTS

By its Attorneys,

s/ Michael A. Wirtz
Jack J. Mikels, BBO# 345560
Michael A. Wirtz, BBO# 636587
JACK MIKELS & ASSOCIATES
1 Batterymarch Park, Suite 309
Quincy, MA 02169-7454
Tel: 617.472.5600

Dated: July 21, 2003

Appendix F

EXHIBIT A

David G. Baker
Attorney at Law
42 Eighth Street, Suite 1000
Charlestown Navy Yard
Boston, Massachusetts 02129
email: dbaker@lawyers.com

Tel: [illegible] Fax: 617-507-8411

May 12, 2003

Michael A. Wirtz, Esq.
Jack Mikels & Associates
1 Batterymarch Park
Quincy, Massachusetts 02169-7454

Re: Robert Marrama

Dear Mr. Wirtz:

On Friday, I received your Motion to Examine my client pursuant to Rule 2004. It indicates that you intend to conduct the examination tomorrow at 10 a.m. Leaving aside the extremely short notice, I am not available as I have a hearing in Worcester at that time.

More to the point, however, I have spoken with my client and he has instructed me to inform you that he declines to answer any questions you may have and he intends to exercise

his Fifth Amendment right, as he did in the state court litigation when you accused him of crimes.

I question the necessity of any further questioning, in any event, give that you have already deposed him for two days and that you took all of his books and records and destroyed them during the state court litigation. In my client's view, the present activity is solely for harassment. Accordingly, neither I nor my client will appear tomorrow, and I will seek a protective order from the Court.

Sincerely

s/ David G. Baker

David G. Baker

DGB/hs

Cc: Trustee Mark DeGiacomo

APPENDIX G — TRANSCRIPT OF HEARING OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS - BOSTON DATED AUGUST 27, 2003

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS - BOSTON

Case #03-11987

Boston, Massachusetts
August 27, 2003
9:30 a.m. O'clock

IN THE MATTER OF:

ROBERT LOUIS MARRAMA

Debtor

TRANSCRIPT OF HEARING ON: (#50) VERIFIED NOTICE OF CONVERSION TO CHAPTER 13; (#54) CHAPTER 7 TRUSTEE'S OPPOSITION; (#63) OPPOSITION OF CITIZENS BANK OF MASSACHUSETTS; (#73) DEBTOR'S RESPONSE TO CHAPTER 7 TRUSTEE'S OBJECTION; BEFORE THE HONORABLE WILLIAM C. HILLMAN, J.U.S.B.C.

* * *

(At Tape #1, Index #46. 9:30 a.m.)

Appendix G

THE COURT: Robert Louis Marrama.

MR. BAKER: Good morning, Your Honor. David Baker for the debtor.

THE COURT: Okay, you filed the notice of conversion. There's an opposition from the Chapter 7 Trustee. Can I hear from the Chapter 7 Trustee?

MS. BOGDANOV: Yes, Your Honor.

THE COURT: Ms. Bogdanov.

MS. BOGDANOV: Olga Bogdanov, Your Honor.

THE COURT: Go ahead. It's up to you. I know what he wants.

MS. BOGDANOV: The Chapter 7 Trustee opposes the debtor's conversion to a 13. The notice of conversion is made in bad faith, and conversion would constitute an abuse of the bankruptcy process. The notice of conversion is made in bad faith for failure to disclose the following two assets and one transfer of property:

The debtor did not identify the transfer of his Maine property into a trust within one year of the petition date on his Statement of Financial Affairs. The debtor also failed to identify his receipt of rental income from his Gloucester, Massachusetts property in his schedules. The debtor further failed to identify his entitlement to a tax refund that the Trustee only recently found out about in his schedules.

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First, the debtor identified his interest in the Maine property on Schedule B, indicating that he is a beneficiary of a spendthrift trust. The debtor did not, however, disclose in his answer to Question 10 on the Statement of Financial Affairs that he transferred the Maine property into the trust, in his own words, to protect it, within one year prior to the petition date.

Had the Trustee not asked questions and inquired into what is the nature of this spendthrift trust and the transfers around it, the Trustee would never have discovered this transfer, and that the debtor is the 100 per cent beneficiary of the trust, and that the debtor's girlfriend is the Trustee of the trust.

It's the Trustee's position that this transfer was a fraudulent transfer, recoverable by the Trustee for the benefit of the debtor's estate. According to the debtor's estimate of value, there is at least $85,000 in equity for the estate in this property. At the Section 341 meeting the Trustee indicated to debtor's counsel that he would seeking to recover this property, and it is only after that that the debtor filed his notice of conversion.

The debtor also testified at his 341 meeting that the Gloucester, Massachusetts property is a rental property from which he receives a rental income, and only amended his schedules after the Trustee discovered the income at the 341 meeting. Furthermore, the Trustee was recently contacted by the IRS in — from Augusta, Maine, and informed that the debtor had filed an amended tax return in July of 2002 for a tax refund; and now the IRS informs the Trustee that the

debtor is entitled to $8,700 in a refund. Once again, this is an asset that was not disclosed on the debtor's petition.

Clearly here, the request for conversion is made in bad faith. The debtor did not disclose all of his assets and intended to continue in the 7, hoping that the Trustee would not notice any of these non-disclosures. Case law in our jurisdiction holds that a debtor's right to convert to a 13 is not unlimited and may be denied in these types of circumstances. In the *Porter* case the debtor failed to disclose in his petition transfers of real estate to family members and only filed his amendments after the Trustee discovered the transfer. Also, in the *Jaffrey* case, the debtors failed to list a lawsuit in their schedules as an asset of the estate. In both of those cases, conversion was denied.

In this case, conversion would constitute an abuse of the bankruptcy process. The Chapter 7 Trustee should be allowed to administer this case and get a substantial dividend to creditors sooner rather than later, and the debtor should not be allowed to abuse the system by not disclosing assets, hoping that the Trustee does not notice.

THE COURT: Thank you.

MS. BOGDANOV: Thank you, Your Honor.

THE COURT: Citizens?

MR. WIRTZ: Yes, Your Honor. In addition to that, I just have to say in our papers I think I highlighted a lot of the underlying action and the abuse and misconduct that the

debtor had done in an action which Citizens Bank brought against the debtor and his defunct company.

I would like to just point out that the underlying action was quite contentious, and it has been stayed by discovery — discovery was to be compelled concerning assets that the debtor had in that case but was stayed because he filed this bankruptcy action. I think I highlighted in my motion that — or in my opposition that there was instances in which the debtor filed partial and criminal charges against two of the bank vice-presidents and me personally because we went to shut down the RLM Flooring Company under an order of the Court. He did that in order to get a settlement advantage in the underlying case.

He also has avoided answering any type of interrogatories or appearing for a deposition in the underlying case, claiming the Fifth Amendment; and he did so in this case in which you ordered him to appear for a 2004 exam, and he wrote to me on the eve of the examination and his counsel did and said, "I'm not appearing, and even I did, I'm going to plead the Fifth to all of your questions."

I think that this further constitutes and shows that there's bad faith in conversion, and that it would be a misjustice to the system to have him convert.

THE COURT: Thank you. Anyone else wish to be heard on the conversion motion?

MR. BAKER: I would.

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THE COURT: Mr. Baker, your turn.

MR. BAKER: Thank you, Your Honor. First I want to correct one false statement that both the Trustee and Citizens Bank have been persisting in — that's that he had any rental income as of the petition date. He did not. He did not testify to that, and he did not have it. It's simply false.

He did — he testified at that time that he expected to have rental income in the future. He now has that rental income. He's now employed, as — on the petition date he was unemployed, and that's the only reason he filed a Chapter 7 instead of a 13, that was because he was unemployed and unqualified for Chapter 13. As disclosed on the amended Schedules I and J, which we filed on August 11th, he now has about $1,300 a month in excess income, and (unclear mumble of words) the bankruptcy assessment for him to stay in Chapter 7 in that situation.

Now with regard to the transfer, that was a scrivener's error, which — actually my fault. I knew about - I knew about that, and it simply was inadvertently omitted from the Statement of Financial Affairs.

With respect to the tax return, we found out about that at about the same time the Trustee did; and since the money is going to the Trustee anyway, I fail to see any harm there.

In general, we just — we just feel that there is no egregious behavior of the type that occurred in the cases that have been cited by the Trustee, and conversion should be allowed.

Appendix G

THE COURT: Thank you. Trus —

MS. SOLOMON: Your Honor, may I be heard?

THE COURT: Yes.

MS. SOLOMON: I haven't had the benefit of looking at the debtor's original schedules. I just looked at his Schedule F. According to Schedule F, the debtor has approximately $231,000 of unsecured debt. If the Chapter 7 Trustee's representation is correct as to the amount of equity that would be available in a Chapter 7 bankruptcy case, that would be $85,000.

What I see from the amended schedule is that the debtor proposes to pay $1,300 a month into a Chapter 13 plan. If the debtor were to pay $1,300 a month, trying to pay at least $85,000 into a Chapter 13 case, the case would have to last more than sixty months; so based on those limited facts, it appears that a Chapter 13 isn't going to be feasible anyway, because the debtor would have to pay for more than sixty months, and the Code doesn't allow that.

THE COURT: Thank you. Anyone else? I don't think there's an "Oops" defense to the concealment of assets. I believe that there is an obligation on the part of people who file schedules in bankruptcy cases to get it right, and certainly in my mind is a major presumption of bad faith when you have a grantor trust within a year of the bankruptcy and the property is not disclosed. This one smells sort of like my *Fleury* decision — I think that's been published by now — it's within the last month or two. F-L-E-U-R-I-E, if I

remember correctly. (sic — F-L-E-U-R-Y is the correct spelling. See 02-15033-WCH)

This is a bad faith case. This — the conversion will not be permitted. The Chapter 7 Truste : can continue. Thank you very much.

MS. BOGDANOV: Thank you, Your Honor.

MS. SOLOMON: Thank you, Your Honor.

MR. BAKER: Thank you, Your Honor.

MR. WIRTZ: Thank you, Your Honor.

(End at Tape #1, Index #575.)

APPENDIX H — TRANSCRIPT OF MEETING OF CREDITORS PURSUANT TO 11 U.S.C. SECTION 341 DATED APRIL 24, 2003

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

U.S. Bankruptcy Court
Massachusetts District

DOCKET NO. 03-11987-WCH

IN RE: MARRAMA

* * *

THE CLERK: Robert Marrama.

CHAPTER 7 TRUSTEE: Anyone who ah, is involved in this case, wants to ask any questions, you're welcome to come up to the table. Are you all involved in the case? Pull up some chairs. Make yourself comfortable. Sir, please raise your right hand.

(Mr. Marrama sworn)

CHAPTER 7 TRUSTEE: Please state your name.

MR. MARRAMA: Robert Marrama.

CHAPTER 7 TRUSTEE: Okay. And we've confirmed both I.D. and Social Security number. Um, sir, ah, start out by telling me why you filed bankruptcy.

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MR. MARRAMA: Well, I had a ah, floor covering company and um, [inaudible] that I could no longer keep the company going.

CHAPTER 7 TRUSTEE: Make sure you keep your voice up, sir.

MR. MARRAMA: I had a floor covering company. RLM Flooring, Inc. The company ah, wasn't able to keep going because of financial difficulties. And I had to close the business. And the outcome was I had to, I had to file personal bankruptcy.

CHAPTER 7 TRUSTEE: Okay. Um, are you working?

MR. MARRAMA: I could no longer ah, you know, pay the debt —

CHAPTER 7 TRUSTEE: Uh-huh.

MR. MARRAMA: — that I have accumulated.

CHAPTER 7 TRUSTEE: Did you have some personal liability on those business debts?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Okay. Um, was that company — ah, was that a separate company? A separate entity or was that just UDBA?

MR. BAKER: It was a corporation.

MR. MARRAMA: A corporation.

CHAPTER 7 TRUSTEE: It was a corporation.

MR. MARRAMA: S Corp. Yes.

CHAPTER 7 TRUSTEE: Has that filed bankruptcy?

MR. MARRAMA: No, sir.

CHAPTER 7 TRUSTEE: Obut I gkay. Does it ah, plan on filing bankruptcy or just

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: It's just gone?

MR. MARRAMA: It's gone.

MR. BAKER: It's — no, there was extended litigation between the corporation and Mr. Marrama and Citizens Bank. Basically Citizens Bank took the corporation.

CHAPTER 7 TRUSTEE: Re —

MR. BAKER: Whatever the assets —

CHAPTER 7 TRUSTEE: — repossessed —

MR. BAKER: — [inaudible] —

CHAPTER 7 TRUSTEE: — all the assets —

MR. BAKER: Yes.

CHAPTER 7 TRUSTEE: — and so forth. So there's nothing left there. Okay. And it was a flooring company?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Residential? Commercial? Both?

MR. MARRAMA: Ah, mainly commercial.

CHAPTER 7 TRUSTEE: Okay. I'm going to show you a copy of your bankruptcy petition, sir. Do you recognize your signature?

MR. MARRAMA: Yes, Your Honor.

CHAPTER 7 TRUSTEE: Ah, did you prepare your schedule, the statement of affairs with the help of your attorney?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Is everything accurate to the best of your knowledge?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: All right. Um, what is the address of the Gloucester real estate?

MR. MARRAMA: 47 East Main Street, Gloucester.

CHAPTER 7 TRUSTEE: Okay. Other than that real estate, have you ever owned any other real etate?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Where was that?

MR MARRAMA: Um, I have a piece of property in Maine.

CHAPTER 7 TRUSTEE: You have a piece of property in Maine? That's right. That was listed some —

MR. MARRAMA: Yeah.

CHAPTER 7 TRUSTEE: — funny place.

MR. BAKER: That's actually owned by trust, right?

MR. MARRAMA: Right. That's owned by in trust.

CHAPTER 7 TRUSTEE: By the trust?

MR. MARRAMA: Yeah.

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CHAPTER 7 TRUSTEE: Okay.

THE CLERK: It was on [inaudible].

CHAPTER 7 TRUSTEE: Yeah. Right. Okay.

MR. MARRAMA: Um, I had a house, I've owned a house in Nahant which I sold to purchase Gloucester. Um, I had a house in Burlington, Mass. which I lost through divorce. And um, I had a two family um, in Somerville which I sold.

CHAPTER 7 TRUSTEE: How long ago did you sell that?

MR. MARRAMA: Ah, about three, four years ago.

CHAPTER 7 TRUSTEE: And what did you do with the proceeds from that sale?

MR. MARRAMA: Um, with the proceeds from that sale I used to help ah, put a down payment on the house in Nahant.

CHAPTER 7 TRUSTEE: Okay. And the house in Nahant is the one that you lost in the divorce?

MR. MARRAMA: No, no.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: The house in Burlington, Mass. I lost in the divorce.

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CHAPTER 7 TRUSTEE: And the Nahant house, tell me again what happened to it?

MR. MARRAMA: I sold that.

CHAPTER 7 TRUSTEE: And you used the proceeds.

MR. MARRAMA: Some of the proceeds I used [inaudible]. Right.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: In Gloucester.

CHAPTER 7 TRUSTEE: Okay. What have we got on ah, the house?

MR. BAKER: Um, in terms of the value what, ah, what I have at the moment is a I have a copy of the Lexus record indicating the assessed value in 1999 of, of $125,000 — I'm sorry, $152,300. Um, we for present purposes, we've doubled, approximately doubled that. I mean it's only like three or four years but —

CHAPTER 7 TRUSTEE: Yeah. But I'm gonna need something. I need a broker's opinion of value.

MR. BAKER: Okay.

CHAPTER 7 TRUSTEE: Um, a current broker's opinion of value.

MR. BAKER: Okay.

CHAPTER 7 TRUSTEE: Um —

MR. BAKER: I'll have to get that for you.

MR. MARRAMA: I have an evaluation.

CHAPTER 7 TRUSTEE: Huh?

MR. MARRAMA: I have an evaluation for you.

CHAPTER 7 TRUSTEE: Okay. Okay. Give that to your attorney. That'll be fine. Um, what else do you —

MR. BAKER: Okay.

CHAPTER 7 TRUSTEE: Homestead?

MR. BAKER: Ah, as regards to homestead, I have a copy of it as it was filed. Unfortunately the date ah, it's a recorded [inaudible]. Ah, the date really is not very clear on it. So what I did, I've attached it, I've attached a copy of the title ah, run down which um, it says that according to the title examiner it was filed on February — let me see February 22nd, 2001. On that page. And then there's a copy of the ah, ah, certificate from the Registry's website.

CHAPTER 7 TRUSTEE: Okay. But no date of —

MR. BAKER: Unfortunately there's no date on it. Um, I could — I guess I could go to the Register's —

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CHAPTER 7 TRUSTEE: Yeah. I think I, I need ah, just try to get a clearer copy. I'm not even sure that that is — maybe that's the date there. Um, okay. And ah, loans. Evidence of um, debt. Ah, the amount due on the house?

MR. BAKER: Okay. The Wells Fargo filed a motion for relief from the automatic stay um, which asserts in paragraph um, seven, that ah, that ah, as of February 19th of this year, $250,582.87 was due. And I'll show you a copy of that.

CHAPTER 7 TRUSTEE: Ah, this just came in, right?

MR. BAKER: Yeah. It just came in.

CHAPTER 7 TRUSTEE: Now, did [inaudible] filed [inaudible] yesterday. Okay. So Wells Fargo is saying that they're owed about —

MR. BAKER: And that's just the first mortgage. I'm not sure — we're not sure what the second mortgage is owed.

CHAPTER 7 TRUSTEE: Camelot Financial —

MR. BAKER: If I hear from Camelot —

CHAPTER 7 TRUSTEE: Are you from Camelot?

CAMELOT FINANCIAL: Yes.

CHAPTER 7 TRUSTEE: So —

CAMELOT FINANCIAL: I'm sorry?

CHAPTER 7 TRUSTEE: No — nothing. Go ahead. I was just going to make a bad joke, but go ahead.

CAMELOT FINANCIAL: Thank you.

CHAPTER 7 TRUSTEE: From Cam — Camelot Mortgages. Speak up [inaudible].

CAMELOT FINANCIAL: Ah, the principal balance is about $150,000. There's a significant amount of interest.

CHAPTER 7 TRUSTEE: They have you about ah, $160,000 is what they thought. But maybe even more than that.

CAMELOT FINANCIAL: It might be more than that.

CHAPTER 7 TRUSTEE: And Presidential Financial is ah, a third mortgage ah, attachment by Citizens. Have you moved to get rid of these liens?

MR. BAKER: Yes.

CHAPTER 7 TRUSTEE: [Inaudible] And um —

MR. BAKER: It's on for hearing next Wednesday.

CHAPTER 7 TRUSTEE: Okay. [Inaudible]. All right. Presidential Financial Corp. That's seven, about $750,000. What was that loan all about?

MR. MARRAMA: Ah, that loan never really took place, ah, sir. That was something that we had — we were going to hope to get ah, for relief, to keep the business going and pay down Citizens Bank. But that never ah, we never closed on that loan.

CHAPTER 7 TRUSTEE: But there's a mortgage of record?

MR. BAKER: There is a mortgage of record.

MR. MARRAMA: They never released —

CHAPTER 7 TRUSTEE: But, but they never gave you any money?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Okay. So even though they're listed as a mortgage record, they never gave you any money?

MR. MARRAMA: Correct.

CHAPTER 7 TRUSTEE: Okay. Camelot's mortgage, what did they um, what did you do with that money?

MR. MARRAMA: That money was directly wire transferred trom their account into my business account.

CHAPTER 7 TRUSTEE: And you — obviously you personally guaranteed to Camelot —

MR. MARRAMA: That's correct.

CHAPTER 7 TRUSTEE: — the obligation? All right. And Wells Fargo, was that just a first mortgage ah, purchase money mortgage or —

MR. MARRAMA: Yes. Wells Fargo was a mortgage.

CHAPTER 7 TRUSTEE: Did you use that money to buy the house?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Okay. All right.

THE CLERK: And what was the first mortgage?

CHAPTER 7 TRUSTEE: Ah, Wells Fargo was the first mortgage.

THE CLERK: Wells Fargo. That's —

CHAPTER 7 TRUSTEE: Yeah.

THE CLERK: Okay.

CHAPTER 7 TRUSTEE: So that was just a purchase money mortgage. Camelot's money was used for the business and Presidential never gave any money. Okay. Ah, and um, you, you must have statements from Wells Fargo at home that show how much money is owed?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Could you just send a copy to your attorney?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Um —

MR. MARRAMA: This is [inaudible] —

CHAPTER 7 TRUSTEE: Oh, I'm sorry, I'm sorry. You're right. Ah, this one is from Wells Fargo.

MR. BAKER: This is —

CHAPTER 7 TRUSTEE: Okay. No, that is sufficient. Yeah. That's fine. I'll look at that. Okay. Ah, under $1,000 dollars in cash or the bank, is that true?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Ah, do you own any item of personal property worth more than $500 a piece other than perhaps the watch?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Ah, do you own any life insurance other than term?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Are you the beneficiary of anyone's life insurance, estate or trust?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Do you have any IRA's, retirement accounts?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Ah, stocks or bonds other than the stock in the now defunct RLM?

MR. MARRAMA: Correct.

CHAPTER 7 TRUSTEE: And no other stocks?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Ah —

MR. BAKER: Ah, to, to clarify [inaudible], he is the beneficiary of the, the realty trust which owns the property in Maine. And I have a copy of that declaration of the trust.

CHAPTER 7 TRUSTEE: Yeah. Okay. Let me — we'll get to that. But ah, accounts receivable. The company may have some but you don't have any?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Nobody owes you any money?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Any litigation you can bring to collect money?

MR. MARRAMA: [No audible response.]

CHAPTER 7 TRUSTEE: Do you have a counterclaim against Citizens?

MR. BAKER: A potential counterclaim, yes. Um —

CHAPTER 7 TRUSTEE: Has it been asserted?

MR. BAKER: Ah —

MR. HOLLAND: It's been asserted.

MR. BAKER: Attorney Jack Hol —

MR. HOLLAND: I asserted it.

MR. BAKER: Attorney Jack Holland represented him in the, in the corporation in the civil, in the litigation against Citizens Bank so I'd ask him to —

MR. HOLLAND: Several million dollars.

CHAPTER 7 TRUSTEE: Okay.

MR. HOLLAND: The counterclaim.

CHAPTER 7 TRUSTEE: Is that — and that's pending now, Jack?

MR. HOLLAND: Well, it's — the, the stay because your Honor [inaudible], stayed —

CHAPTER 7 TRUSTEE: But it's pending?

MR. HOLLAND: It's pending. It's up to you to decide at some point ah, what you wish to do with it.

CHAPTER 7 TRUSTEE: Okay.

MR. HOLLAND: So when you're ready to do that I'll bring over the documents and I'll debrief you.

CHAPTER 7 TRUSTEE: Okay.

MR. HOLLAND: I'm sure the bank's counsel will as well.

CHAPTER 7 TRUSTEE: Okay. Good. All right. Um, okay, let's talk about this ah, property in Maine. Okay. It's held in ah —

MR. BAKER: Here's a copy of the declaration of trust. Ah, you'll note paragraph six has ah, spend thrift language.

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CHAPTER 7 TRUSTEE: Okay. Who is Josephine?

MR. MARRAMA: Josephine's ah, my girlfriend.

CHAPTER 7 TRUSTEE: Okay. So let's — and she is the trust and you are the 100 percent beneficial interest holder in the Omar Realty Trust?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Okay. Ah, when was this trust — it looks like the trust was created in ah, August of 2002?

MR. MARRAMA: I think it was before that wasn't it?

MR. BAKER: Um, I don't know. This was handled by a firm in Maine.

MR. MARRAMA: Yeah. I, I don't know the exact date. I thought it was 2001. I'm not sure of that. I'd have to check with the attorney up there. Jeff Clark [phonetic] was the attorney [inaudible].

CHAPTER 7 TRUSTEE: Okay. Okay. The attorney up there, let's get his information. What's his name?

MR. MARRAMA: Jeff Clark.

CHAPTER 7 TRUSTEE: Jeff Clark.

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Do you recall ah, where, where is his office?

MR. BAKER: Um, it's in York, Maine.

CHAPTER 7 TRUSTEE: Do you have a number there

MR. BAKER: Um —

CHAPTER 7 TRUSTEE: — for him?

MR. BAKER: A telephone number?

CHAPTER 7 TRUSTEE: Yeah.

MR. BAKER: Tw — ah, 207 — oh, let's see — oh, that's not right [inaudible]. 207-363-5208 it looks like.

CHAPTER 7 TRUSTEE: All right. And the um, the only thing that this trust owns is um, real estate in Maine?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Okay. Um, what would — tell me about this real estate. Where, where is it located? What's the address? What is it?

MR. MARRAMA: It is a um, cottage, single family dwelling. Um, it's located in York, Maine on Norton Avenue.

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CHAPTER 7 TRUSTEE: Is there a number on Norton Avenue?

MR. MARRAMA: Twenty-seven.

CHAPTER 7 TRUSTEE: 27 Norton. Okay. Ah, and when was that first purchased by you or any relative?

MR. MARRAMA: Um, I believe it was purchased five years ago. Four or five years ago.

MR. BAKER: Can I see that?

CHAPTER 7 TRUSTEE: Ah, let me look at it first (inaudible). Go, go back please. Ah, by whom?

MR. MARRAMA: It was purchased by me four — about five years ago.

CHAPTER 7 TRUSTEE: Okay. So you bought the, the property five years — did you buy it from a relative or anything?

MR. MARRAMA: No, I bought it ah, it was a ah, owner financed property that was an advertisement that was on a ah, actually it was on the telephone pole. I was away for the weekend in York, Maine and we drove by the property to look at it. And it was ah, owner financed property.

CHAPTER 7 TRUSTEE: Okay. And um, and how much did you pay for it? .

MR. MARRAMA: Ah, $40,000 dollars.

CHAPTER 7 TRUSTEE: And was that all cash, did you — or did you say the owner took back a mortgage?

MR. MARRAMA: No, the owner took back a note. put 10 percent down and the owner took back a note.

CHAPTER 7 TRUSTEE: So you put down $4,000?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Okay. And he took back a note for the $36,000?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Roughly.

MR. MARRAMA: Correct.

CHAPTER 7 TRUSTEE: Okay. Um, and you bought it in your own name?

MR. MARRAMA: At that time, yes.

CHAPTER 7 TRUSTEE: At that time. Okay. Is there still money owed on the ah, note?

MR. MARRAMA: I have ah, ac — I refinanced it through um, Bank —

MR. BAKER: I think I saw it something in —

MR. MARRAMA: Bank One I believe it is.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: Yes. I refinanced through Bank One.

MR. BAKER: I have a statement from Bank One dated ah, November 18th, 2002 um, which unfortunately doesn't give the ah — oh, I'm sorry, yes, it does Principal balance as of that date was $134,778.

CHAPTER 7 TRUSTEE: Now, did you do some work to the house?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: What did you do?

MR. MARRAMA: I ah, put new siding on and I added a um, two bedrooms upstairs.

CHAPTER 7 TRUSTEE: Okay. Substantially increased the value —

MR. MARRAMA: Yeah.

CHAPTER 7 TRUSTEE: — it sounds like?

MR. MARRAMA: Yes.

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CHAPTER 7 TRUSTEE: Okay. Um, so you — ah, when did you take out this mortgage with Bank One?

MR. MARRAMA: Ah, back in the spring of last year I believe. I don't recall the exact date but it was —

CHAPTER 7 TRUSTEE: Sometime —

MR. MARRAMA: — probably a year ago or maybe less.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: Approximately.

CHAPTER 7 TRUSTEE: All right. Um, and so you got about $100,000 dollars cash out of the refinance it sounds like.

MR. MARRAMA: It was $135,000.

CHAPTER 7 TRUSTEE: But you paid off the first —

MR. MARRAMA: Right.

CHAPTER 7 TRUSTEE: — the, the one you —

MR. MARRAMA: Right.

CHAPTER 7 TRUSTEE: — the purchase money.

MR. MARRAMA: That's right.

CHAPTER 7 TRUSTEE: And then you — and you were left with about $100,000 in cash?

MR. MARRAMA: Yeah, it was yeah, a little more than that I believe, but yes.

CHAPTER 7 TRUSTEE: Okay. Um, and what happened to that $100,000'ish?

MR. MARRAMA: Um, it was about — if I remember correctly, $40,000 or $50,000 dollars I had to give back to — the um, the bonding company had advanced us some money and I had to give some money back to ah, to a contractor because we, we used that money from them through the bonding money, it was supposed to, we were supposed to get from the contractor. So I had to give that, about $40,000 or $50,000 of that back. Um, I tried to pay off some personal debt and the rest of the money I just actually was living with until not too long ago and now we, you know —

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: — depleted.

CHAPTER 7 TRUSTEE: Did you um, did you take the proceeds from that closing and put it into a, a single bank account and just write checks off of that?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Okay. Ah, and you say now all the money is gone?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Okay. Ah, what I'd like to do — okay. Do we have anything on the evidence, the current evidence of value of this?

MR. BAKER: For that property. I could get something but do you question the validity of the spend thrift provision?

CHAPTER 7 TRUSTEE: Ah, yes. He bought this property and ah — okay. So we have here an appraisal showing $220,000 as of last year. [Inaudible]. So why don't we get an, an updated ah, broker's opinion of value or something on the um, on the property.

MR. MARRAMA: Okay.

MR. BAKER: Okay.

CHAPTER 7 TRUSTEE: Um, and I'd like to get the HUD statement ah, for the closing. And then I need um, checking statements —

Mr. BAKER: okay.

CHAPTER 7 TRUSTEE: — and copies of the checks that show how it was spent.

MR. BAKER: Okay. I'm not sure we're gonna be able to comply with that request. During this litigation with Citizens Bank, Citizens seized all — with the permission of the Superior Court, seized all of his bus — per — business and personal records and then di — and then again with the permission of the Superior Court, destroyed them. Here's a copy of Citizens Bank's motion and a copy of the Order allowing them to be destroyed.

CHAPTER 7 TRUSTEE: Okay. Was this, the account that the money went into and was um, disbursed out of, with Citizens Bank account?

MR. MARRAMA: Yes, sir.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: However it was —

CHAPTER 7 TRUSTEE: Citizens is —

MR. WERTZ: Right here.

CHAPTER 7 TRUSTEE: [Inaudible] Citizens. Okay. I assume you guys can get that for me on microfiche or whatever.

MR. WERTZ: For the Citizens —

CHAPTER 7 TRUSTEE: For the, for this account. Yeah. I mean is that true? Is it all — you, you took them all and they're all destroyed now?

MR. WERTZ: No, it's not true. And if there are particular records that they claim are in our possession we have an inventory which was taken by a stenographer.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: So we can show what was taken.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: Ah, under the Order ah, we were allowed to give notice to — and this become an issue I think in this case — we were allowed to give notice, 10 days notice to ah, Mr. Marrama's counsel, Jack Holland who spoke earlier here today, which we did and got no response, didn't want any part of the records. Some of them may have been destroyed pursuant to the Order. Others we may still have in our possession. So if there is a list of records that they're looking for, I'd say they come forward now and say which ones they want.

CHAPTER 7 TRUSTEE: Well, I'm, I'm looking for the records.

MR. WERTZ: Yep.

CHAPTER 7 TRUSTEE: Um, so I think whether it's original records that you may not have destroyed or obviously you know, I, I'm just looking for checking statements and cancelled checks. I want to know um, how this gentleman spent $100,000 dollars since the last spring, approximately.

MR. WERTZ: Yeah.

CHAPTER 7 TRUSTEE: Um, to be able to see where that money went.

MR. WERTZ : I —

CHAPTER 7 TRUSTEE: Okay?

MR. WERTZ: In our litigation, I think that we've looked into that.

CHAPTER 7 TRUSTEE: Uh-huh.

MR. WERTZ: And I don't think that it was deposited into the Citizens account. I'll double check, but we've been trying to trace this money our — ourselves. There's been other mortgages with ah, pretty substantial amounts of money and that all sort of disappeared and dissipated as well.

CHAPTER 7 TRUSTEE. Um, are you confident that the money went into that Citizens Bank account?

MR. MARRAMA: The money was drawn um, we passed papers in Maine. The money was ah, originally deposited into the, the attorney's bank from Maine and then I had wrote a check from that bank to my account in Citizens.

CHAPTER 7 TRUSTEE: Okay. Well, that's, that's what I, I'm looking for on that piece, so —

MR. WERTZ: Okay.

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CHAPTER 7 TRUSTEE: — whatever ah, whatever we can get on that. All right.

MR. WERTZ: It was — there, there was a second account to ah, I think the Trade Union Bank ah, in South Boston. Um, and we've been trying to track down records for that as well. There is two individuals who I'll ask about later, who have those records and I think [inaudible] as well.

CHAPTER 7 TRUSTEE: Are those um, for personal, personal accounts?

MR. WERTZ: Both personal and ah, corporate accounts.

CHAPTER 7 TRUSTEE: Okay. All right. But we think the money went through the Citizens account?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: This money that we're talking about?

MR. MARRAMA: Yeah. I never had a personal account with [inaudible].

MR. BAKER: Okay. Ah, [inaudible] I'm sure that anything that Citizens —

MR. WERTZ: I can provide you —

MR. BAKER: — that I get a copy of it.

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CHAPTER 7 TRUSTEE: Yep. Okay. Um, so Jack, you're, you're listed as a creditor?

MR. HOLLAND: That's correct.

CHAPTER 7 TRUSTEE: Okay. But you're — this — you, you were cou — and you're still counsel, you didn't withdraw from that case?

MR. HOLLAND: No.

CHAPTER 7 TRUSTEE: Okay. Um, on the Schedule F, um, obviously you, you've listed ah, everything that — well, I think obviously — that he may be liable for um, I'm assuming some of these there aren't guarantees, but given the fact that, you just put them in, in an abundance of caution?

MR. BAKER: Exactly.

CHAPTER 7 TRUSTEE: Okay. So um, because people who actually um, have personal guarantees or can legitimately assert personal liability ah, is some subset of, of this group?

MR. BAKER: Yeah.

CHAPTER 7 TRUSTEE: Okay. And you now work for another ent — Capital Carpet and Flooring, sir?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: And do you have any ownership interest in that business?

MR. MARRAMA: No, sir.

MALE VOICE: What was the name of that company?

MALE VOICE: It's his brother's company.

CHAPTER 7 TRUSTEE: Ah, Capital —

MALE VOICE: Capital —

CHAPTER 7 TRUSTEE: — Carpet and Flooring. Ah, Statement of Affairs question one. There's no dollar amount?

MR. BAKER: There should be. Ah, we, we weren't able to get copies of his tax returns. I think that's ah, why that's — the dollar amount [inaudible].

CHAPTER 7 TRUSTEE: Okay.

MR. BAKER: Once we, once we get his tax returns.

CHAPTER 7 TRUSTEE: Okay. Okay. And two vehicles have been repossessed. The Lexus and the Dodge Ram?

MR. MARRAMA: Yes. Plus the um —

CHAPTER 7 TRUSTEE: The boats? More?

MR. MARRAMA: Oh, yeah. There was another um, truck that was — no — yeah, it was a truck that was leased by Hertz that they took back.

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CHAPTER 7 TRUSTEE: Okay. [Inaudible]. Okay. All right. Um, what I'm going to do now ah, as, as we discussed I think um, yesterday, give people a few minutes to ask really relevant questions. What I'm interested in at this point is any information ah, that may lead to asset recovery from the personal estate for the benefit of creditors. Ah, we can continue this ah, 341 meeting in my office, ah, where we'll have plenty of time, or as I suggested the ah, yesterday or the day before ah, people may want to think about 2004 examinations to make it a little more official. Um, but for now everyone just, just take a few minutes and then we'll um, we'll continue this matter anyway. And if we want to, people want to do it in my office, that'll be fine. Okay?

MR. WERTZ: Great. Ah, on behalf of Citizens Bank, Michael Wertz.

MR. BAKER: Could I have a card? Do you have a business card?

MR. WERTZ: I'll get it.

.MR. BAKER: Thank you.

CHAPTER 7 TRUSTEE: From Jack Michael's office.

MR. WERTZ: [Inaudible]. Ah, I think earlier I mentioned that there was some records taken from the company ah, which the bank was not able to get, including personal records and business records. And they're held by the name of individuals by testimony from other witnesses,

of Cindy Cutty [phonetic] and a Gary K. Baker. And I just want to know where those individuals are since they've avoided and ah, are in contempt of subpoenas in the Superior Court action.

CHAPTER 7 TRUSTEE: Do you know who those people are?

MR. BAKER: Well Gary Baker is his ah, accountant.

MR. MARRAMA: Yeah. Gary Baker I hired as an accountant.

CHAPTER 7 TRUSTEE: Okay. So he has —

MR. BAKER: He's no relation to me by the way.

CHAPTER 7 TRUSTEE: I, I assume not. Ah, and does he have some business records of the corporation?

MR. MARRAMA: Um, I don't recall it was business records. I know that he worked — at the time we were trying to get refinancing and everything um, Gary had come in and he had someone come in to help him. I wasn't really sure as to who the, who the people were that he had come in to help him. I wasn't sure of their names. I just knew Gary.

MR. WERTZ: Okay.

MR. MARRAMA: All right. But ah, yeah, but we did have someone come in because we were trying to ah, we —

were hoping at that time for ah, some financing to go through to keep the company alive.

CHAPTER 7 TRUSTEE: All right. So he may have some business records.

MR. MARRAMA: Ah, he may have but I'm, I'm not sure.

CHAPTER 7 TRUSTEE: Okay. And where is he located.

MR. MARRAMA: I'm not sure where Gary is.

MR. BAKER: Ah, he has an office in Stoughton and an office in —

MR. MARRAMA: Yeah, he's always —

MR. BAKER: — [inaudible].

MR. MARRAMA: — he always came to my —

MR. BAKER: He's back and forth between —

MR. MARRAMA: — office.

MR. BAKER: — Florida and Massachusetts.

CHAPTER 7 TRUSTEE: All right.

MR. BAKER: He's, I think he's in Florida at the moment.

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CHAPTER 7 TRUSTEE: All right. But he has an office in Stoughton?

MR. BAKER: Uh-huh.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: I know that he is coming up in June to answer a ah, criminal complaint in the Stoughton District Court for some insurance fraud. Ah, perhaps on his trip back up he can bring those records with him.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: And Cindy Cutty who is local and she lives in Norwood.

CHAPTER 7 TRUSTEE: And who is she?

MR. WERTZ: Ah, she supposedly is affiliated with Mr. Baker and we would like all the records that she seized from the company as well.

MR. BAKER: Yeah. With Mr. Baker [inaudible] Mr. Baker.

CHAPTER 7 TRUSTEE: Do you, do you know Cindy Cutty?

MR. MARRAMA: I don't know her personally, no.

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CHAPTER 7 TRUSTEE: But she's —

MR. MARRAMA: [inaudible] —

CHAPTER 7 TRUSTEE: — [inaudible] person that you talked about coming in and stuff like that?

MR. MARRAMA: Yep.

CHAPTER 7 TRUSTEE: Okay. All right. Why don't you follow up um, follow up with me on that one.

MR. BAKER: Okay.

MR. WERTZ: Ah, the ah, next question I have is Gloucester property is a two family or a two unit property and I'd like to know who's living in the second unit and how much rent is being paid.

MR. MARRAMA: Actually ah, both units are being rented.

MR. WERTZ: So you — don't live there?

MR. MARRAMA: I haven't lived there, no. I couldn't afford the mortgage [inaudible]. I'm four months behind and ah, I believe and Mr. Baker has ah, mentioned um, they have filed for relief.

CHAPTER 7 TRUSTEE: The, the bank has filed for relief? Well, you listed your — where do you live now, sir?

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MR. MARRAMA: I've been living in Maine.

CHAPTER 7 TRUSTEE: Are you living in the cottage in Maine?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: How long you been living there?

MR. MARRAMA: Oh, about two months.

CHAPTER 7 TRUSTEE: Just the last couple of months?

MR. MARRAMA: Yeah.

CHAPTER 7 TRUSTEE All right. And um, and you've been renting a, you're renting —

MR. MARRAMA: I just —

CHAPTER 7 TRUSTEE: — both sides?

MR. MARRAMA: Yes. Yes, just started renting it, yes

CHAPTER 7 TRUSTEE: Okay. You, when you say just started, just within the last —

MR. MARRAMA: The last month.

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CHAPTER 7 TRUSTEE: — month or so? Okay. And you're getting rental from them? You're getting rent from these folks?

MR. MARRAMA: Um, I will be starting at May 1st.

CHAPTER 7 TRUSTEE: Okay. How much rent?

MR. MARRAMA: The upstairs um, ah, apartment is $1,500 and the downstairs is $650. Which would have been just enough to cover the mortgage.

CHAPTER 7 TRUSTEE: So what is your long term plan with the Gloucester house?

MR. MARRAMA: Well, the long term plan is to hopefully some day is to reside there.

CHAPTER 7 TRUSTEE: So the foreclosure's going forward though or —

MR. MARRAMA: Yeah.

CHAPTER 7 TRUSTEE: — they're gonna be getting relief.

MR. BAKER: We have um — well, we hope to, hope not. Hope that that won't happen. We're looking at some refinancing.

MR. MARRAMA: We're looking at some refinancing —

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CHAPTER 7 TRUSTEE: All right.

MR. MARRAMA: — ah, options.

CHAPTER 7 TRUSTEE: And the amount — that's when you listed rent ah, mortgage, you have $1,949 dollars. Is that for all of the mortgages on the house?

MR. MARRAMA: Ah, yes. It's actually a little more than that, I believe, sir, with the ah, taxes and everything.

CHAPTER 7 TRUSTEE: And what about the mortgage payment on Maine for —

MR. MARRAMA: That just — that's ah, $1,009 dollars a month or $1,010 I believe.

CHAPTER 7 TRUSTEE: Okay. So that's —

MR. BAKER: Do you pay that?

MR. MARRAMA: Ah, yeah. But it's two payments behind as of right now. [Inaudible].

MR. BAKER: Okay. But you pay that? So that should be the current ah —

MR. MARRAMA: Right.

MR. BAKER: — ah —

WELLS FARGO: Excuse me for one second. The payment that you said was for all the mortgages, I believe you meant that payment was just the Wells Fargo mortgage.

CHAPTER 7 TRUSTEE: Ah, the $1,900 that's just Wells Fargo?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Okay. So the other mortgages are not included on the expenditures either? I mean you're hoping to keep the house so you're hoping —

MR. MARRAMA: Yeah. Right.

CHAPTER 7 TRUSTEE: — to continue to pay those.

MR. MARRAMA: Yeah.

CHAPTER 7 TRUSTEE: Okay. So you've to amend Jim.

MR. BAKER: Yeah.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: Ah, we —

CHAPTER 7 TRUSTEE: A couple of more questions.

MR. WERTZ: Sure. With regards to the conveyance to ah, Omar Realty Trust, what was the sales price for that?

MR. MARRAMA: What was the sales price?

MR. WERTZ: Yeah.

CHAPTER 7 TRUSTEE: When you conveyed it to the trust.

MR. MARRAMA: It was the — Pardon me?

CHAPTER 7 TRUSTEE: I assume that's what you're asking right?

MR. WERTZ: I am.

CHAPTER 7 TRUSTEE: Yeah. When you conveyed the, the Maine property to the trust, did the trust pay you anything?

MR. MARRAMA: No.

CHAPTER 7 TRUSTEE: Okay.

MR. MARRAMA: It was just for the value of the property.

CHAPTER 7 TRUSTEE: Why did you put it in trust?

MR. MARRAMA: Why did I put it in trust? Um, I guess to try to protect it.

MR. WERTZ: Yeah. Exactly. Ah, can you tell me what CMM Enterprises is and what your affiliation is with that company?

MR. MARRAMA: CMM Enterprises was a um, company that I started, a limousine company which is ah, all the vehicles have been sold and no longer in existence.

MR. WERTZ: Who were the partners in that business?

MR. MARRAMA: Pardon me?

MR. WERTZ: Who were your partners or who were the investors ah, principals in that business?

MR. MARRAMA: I had a cousin that I was involved with.

MR. WERTZ: And is that company still in existence?

MR. MARRAMA: No. [Inaudible].

CHAPTER 7 TRUSTEE: Two more questions.

MR. WERTZ: Sure. Um, in your Schedule J you have transportation amount of $300 dollars and then you have another addition for $260 for auto payments. Can you tell me what the $300 dollar transportation is?

MR. MARRAMA: Can I see that?

MR. BAKER: It just is a matter form. Usually I ah, put in that line item ah, things for gasoline ah, maintenance of the car.

CHAPTER 7 TRUSTEE: Well, you've got to amend that because you can't just have stock numbers. This has to be based on his experience and what he uses in Schedule J.

MR. WERTZ: And the last question —

CHAPTER 7 TRUSTEE: Well —

MR. WERTZ: — until we adjourn —

MR. BAKER: Well, since he's now living in Maine it's going to be higher obviously, but —

CHAPTER 7 TRUSTEE: Whatever it is, it is.

MR. BAKER: It is, yes.

CHAPTER 7 TRUSTEE: But I just want —

MR. BAKER: Yeah.

CHAPTER 7 TRUSTEE: — real numbers for what his —

MR. BAKER: Yeah.

CHAPTER 7 TRUSTEE: — current expenditures are.

MR. WERTZ: Yeah. Ah, I would like to see a copy of that trust and also the name and address of your girlfriend, Josephine I think you said?

CHAPTER 7 TRUSTEE: I've got —

MR. BAKER: Yes.

CHAPTER 7 TRUSTEE: — I've got a copy um, of the trust. Does she live up there in Maine with you?

MR. MARRAMA: Yes.

CHAPTER 7 TRUSTEE: Okay.

MR. WERTZ: Okay.

CHAPTER 7 TRUSTEE: Okay. A couple of questions sir?

WELLS FARGO: Yeah. Ah, this is with regards to the mortgages and the Gloucester property. You say it's your intent to refinance both mortgages?

MR. MARRAMA: Yes.

WELLS FARGO: Um, but on the other hand ah, you stated the value of the house is ah, under $200,000 dollars.

MR. BAKER: Three hundred. Didn't he say $300,000?

MR. WERTZ: I had actually — not to interrupt —

MR. BAKER: Three hundred.

MR. WERTZ: — but ah, when he refinanced and some. of the monies that has dissipated, ah, I think the last appraisal within the last year was $365,000 for that property.

CHAPTER 7 TRUSTEE: Okay. Well we'll —

MR. MARRAMA: That's not correct.

CHAPTER 7 TRUSTEE: — going to — we're gonna get, we're gonna get a new —

MR. BAKER: We could, we could, we —

CHAPTER 7 TRUSTEE: We'll find out what it currently is.

MR. MARRAMA: He's not correct on that statement.

CHAPTER 7 TRUSTEE: Okay.

WELLS FARGO: Well, I, I guess my question is between the first and the second mortgage the principal balances are over $400,000 dollars.

CHAPTER 7 TRUSTEE: Okay. So the question is if you, just the first and second, you're going be able to strip the liens presumably. The third is not real.

MR. BAKER: Not real.

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CHAPTER 7 TRUSTEE: Um, if the house is worth $300,000 and you owe $400,000 how are you gonna refinance?

MR. MARRAMA: Well, see I don't know because we, we were hoping to, to work out —

MR. BAKER: The details remain to be worked out it sounds like.

CHAPTER 7 TRUSTEE: It sounds like a substantial detail. Not — one more question, sir.

WELLS FARGO: Um —

CHAPTER 7 TRUSTEE: If you have anything.

WELLS FARGO: Nothing.

CHAPTER 7 TRUSTEE: Counsel, you're satisfied over here? Or —

MALE VOICE: He, he's with the Bank.

CHAPTER 7 TRUSTEE: You're with the bank? Okay. Anyone else have any questions? All right. This matter is um — what do you want to — what, what's your pleasure?

MR. WERTZ: Ah, we are going to seek a 2004 deposition however um, because of actions that took place in the State Court action I don't want that to happen here

again. So I'd like to also continue this ah, in the event that ah —

CHAPTER 7 TRUSTEE: Yeah.

MR. WERTZ: — the deposition is not allowed.

CHAPTER 7 TRUSTEE: Okay. Well I'm definitely going to continue this. Um, let's con — ah, what I'm gonna do is continue it now for May 8. But what I'll do David, is I'll give you a call and we'll agree on a date later in May up at my office. Um, so that we'll have some more time and won't be holding up a bunch of people. But for the record I'll continue it to the eight and then on the eight I'll boot it over to whenever. And I'll consult with other ah, anyone else who wants to know about it um, as, as well and then you can decide whether you want to ask qu — I, I'm going to have more questions once I see all these documents. And whether you want to ask some at a continued 341 or at a ah, 2004 is up to you.

MR. WERTZ: Ah, just one last thing. For the next meeting, if they could provide ah, some verification of the claim by Jack Holland of $82,000 I'd like to see something.

CHAPTER 7 TRUSTEE: Well, he's going to have to file a proof of claim and there'll be opportunity to object to the proof of claim. So I, I'm ah, I'm more interested in assets and liabilities right now.

MR. WERTZ: Okay.

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CHAPTER 7 TRUSTEE: Okay.

MALE VOICE: You, you have a hearing, there's a hearing scheduled on the fourth — or April 30th. Is that —

CHAPTER 7 TRUSTEE: Was that one of the —

MR. BAKER: That's to avoid the liens.

CHAPTER 7 TRUSTEE: Avoid the liens.

.MR. BAKER: And I think I'd like to know about the financing before trying to avoid the liens.

CHAPTER 7 TRUSTEE: Well, that's, that's up to you guys. And have a great time in Court on the 30th. I will not ah, be attending. And however it works out, it works out. Okay?

MR. BARER: Thank you.

CHAPTER 7 TRUSTEE: The matter then stands continued to 10 — are we still in the 10's here Chris?

MALE VOICE: Ten-thirty.

THE CLERK: You're still in 10:30.

CHAPTER 7 TRUSTEE: Ten-thirty on the eighth of May.

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THE CLERK: Got it.

CHAPTER 7 TRUSTEE: Very good.

MR. MARRAMA: Thank you, sir.

(Adjourned.)

APPENDIX I — DECLARATION OF TRUST DATED AUGUST 9, 2002

DECLARATION OF TRUST

This Declaration of Trust made by JOSEPHINE BOLLETTIERO of 10 Norton Avenue, York, Maine, hereinafter called the Trustee. The undersigned Trustee agrees to hold all assets delivered to her in her said capacity as set forth herein.

WITNESSETH:

1. This Trust shall be known as the "BO-MAR REALTY TRUST." This shall be a revocable trust.

2. The Trustee shall have complete control and management of the trust property and the power to invest and reinvest the assets of the trust, in such manner and in such property as she shall deem. With the written permission of the beneficiaries, the Trustee shall have the power to borrow money and mortgage the assets of the trust; to purchase or sell any property of any character at public or private sale for cash, credit or mortgage and upon such terms and conditions as they shall see fit; to let, hire or lease any property; to take and give options for land, property or interests to be bought or sold for the trust; to erect buildings and to improve, remodel or otherwise alter or dispose of any buildings of the trust; to pay commissions and fees to brokers and others for services rendered to the trust; to insure the trust and its assets against fire or other possible hazard, liability or contingency in such manner and in such companies as she shall deem advisable; and to execute such

written instruments, contracts, bills of sale, mortgages or other documents as may be necessary to carry out the foregoing powers. No purchaser shall be required to see to the application of the purchase money delivered to the Trustee.

3. No Trustee or beneficiary shall be personally liable for any contract, liability or obligation of the trust and all persons, business associations or corporations dealing with the Trustee shall look only to the funds or property of the trust for payment of any debt, damage, judgment or decree.

4. The Trustee shall not be liable to any beneficiary except for her own willful misconduct and shall not be required to give any bond.

5. The gross receipts from the trust from any and all sources shall be applied to the payment of real estate taxes, water and sewer bills, interest and other expenses of the trust. Any remaining balances may at the discretion of the Trustee be used to reduce encumbrances on the trust property or be divided among the beneficiaries in such a manner as the Trustee shall determinate appropriate.

6. All property whether real, personal or mixed, tangible or intangible that may be transferred, conveyed, assigned or given to the trust shall be held by the Trustee for the benefit of beneficiaries set forth on Schedule A. The share or interest of any present or future beneficiary shall be considered personal property. No rights of the beneficiaries hereunder shall be subject to assignment or anticipation; nor shall said rights be liable for any indebtedness or obligations of any beneficiary; nor shall such rights be subject to attachment or any other order, decree or process of Court on account of, or for the purpose of collecting any such indebtedness or obligation of any beneficiary. Further,

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the Trustee shall not be required to make any disbursement to any assignee or creditor of any beneficiary, or otherwise than to the hands of the beneficiary in person.

7. Following the death of last surviving Primary beneficiary, or upon the sale of all Trust real estate, this trust shall terminate and the Trustee then serving shall distribute the assets then comprising the trust estate among the beneficiaries as set forth on the attached Schedule of Beneficiaries or as the beneficiaries shall instruct the Trustee.

8. The terms of this trust may be amended, modified or added to at any time by an instrument in writing signed and acknowledged by the then acting Trustee and assented to in writing by such of the beneficiaries then having interests in the trust estate who are of legal age according to the laws of the State of Maine. A Trustee may decline or resign at any time by an instrument in writing signed and acknowledged which instrument shall in due course be recorded in the York County Registry of Deeds for the State of Maine. In the event of the death, incapacity or resignation of Josephine Bollettiero as Trustee, then Lisa Passacantilli shall act as successor Trustee with all the powers, rights and responsibilities of the original Trustee. In the event of a vacancy in the position of Trustee, then a majority of the beneficiaries shall elect a successor Trustee. Any successor Trustee shall have all the powers and be subject to the duties and liabilities of the present Trustee.

IN WITNESS WHEREOF, said JOSEPHINE BOLLETTIERO has set her hand this 9th day of August, 2002.

s/ Josephine Bollettiero
JOSEPHINE BOLLETTIERO

Appendix 1

SCHEDULE OF BENEFICIAL INTERESTS

PRIMARY BENEFICIARY
ROBERT MARRAMA

PERCENTAGE OF INTEREST
100%

CONTINGENT BENEFICIARIES

In the event of the death of Robert Marrama, then his interest in the trust shall pass as follows:

A. 50% to Josephine Bollettiero;
B. 25% to Jennifer Marrama;
C. 25% to Jeana Marrama.

FILED
AUG 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 05-996

IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,
and MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 30, 2006
CERTIORARI GRANTED JUNE 12, 2006

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1

FORM B1 UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION DISTRICT OF MASSACHUSETTS

Name of debtor (if individual, enter Last, First, Middle): MARRAMA, ROBERT LOUIS	Name of Joint Debtor (Spouse)(Last, First, Middle) MARRAMA (47
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names): RLM Flooring	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all): 016-44-1726	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code) 47 East Main Street Gloucester, MA 01930	Street Address of Joint Debtor (No. & St., City, State & Zip Code)
County of Residence or of the Principal Place of Business: Essex	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	

FILED 03-11987

Information Regarding the Debtor (Check the Applicable Boxes)

Venue: (Check any applicable box)
- ☒ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
- ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)
- ☒ Individual(s)
- ☐ Corporation
- ☐ Partnership
- ☐ Other _____
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker

Chapter or Section of Bankruptcy Code Under Which the Petition is filed (Check one box)
- ☒ Chapter 7
- ☐ Chapter 11
- ☐ Chapter 13
- ☐ Chapter 9
- ☐ Chapter 12
- ☐ Sec. 304- Case ancillary to foreign proceeding

Nature of Debts (Check one box)
- ☐ Consumer/Non-Business
- ☒ Business

Chapter 11 Small Business (Check all boxes that apply)
- ☐ Debtor is a small business as defined in 11 U.S.C. ' 101
- ☐ Debtor is and elects to be considered a small business under 11 U.S.C. ' 1121(e)(Optional)

Filing Fee (Check one box)
- ☒ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attached signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(c). See Official Form No. 3

THIS SPACE IS FOR COURT USE ONLY

2003 MAR 11 P 2:23
U.S. BANKRUPTCY COURT
DISTRICT OF MASS.
IN CLERK'S OFFICE FILED

Statistical/Administrative Information (estimates only)
- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☒ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

	1-15	16-49	50-99	100-199	200-999	1000-over
Estimated Number of Creditors	☐	☒	☐	☐	☐	☐

	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
Estimated Assets	☐	☒	☐	☐	☐	☐	☐	☐
Estimated Debts	☐	☒	☐	☐	☐	☐	☐	☐

Form Published by: Law Disks, 734 Franklin Avenue, Garden City, NY 11530

03-11987 Ch. 7 WCH
Tru: MARK DEGIACOMO
Mtg: 04-24-2003 Thu
Loc: BOSTON Time: 10:30

2

Voluntary Petition (This page must be completed and filed in every case.)	Name of Debtor(s): ROBERT LOUIS MARRAMA,	FORM B1, Page 2
Prior Bankruptcy Case Filed Within the last 6 years (If more than one, attach additional sheet.)		
Location Where filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct. [If the petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X Robert Louis Marrama
ROBERT LOUIS MARRAMA, Debtor

X _____
, Joint Debtor

_____
Telephone Number (If not represented by attorney)

3/7/03
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

03-11987

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Attorney

X David G. Baker
Signature of Attorney for Debtor(s)

Print below: Attorney Name, Firm, Address, Telephone No.
David G. Baker, Esq. BBO # 634889
42 Eighth Street, Suite 1000
Charlestown Navy Yard
Boston, MA 02129
617-241-8500

3/7/03
Date

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

Name and Social Security Numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. 110; 18 U.S.C. 156.

[Publisher's Note: This form is NOT intended to be used by nonattorney bankruptcy-petition preparers: Schedules do not contain all disclosures required for use by nonattorney bankruptcy-petition preparers.]

FILED IN CLERK'S OFFICE
2003 MAR 11 P 2
U.S. BANKRUPTCY COURT
DISTRICT OF MASS.

Exhibit A

(To be completed if the Debtor is required to file periodic reports (e.g., forms 10K and 10Q with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

[] Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if Debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter.

X David G. Baker 3/7/03
David G. Baker, Esq., Attorney for Debtor(s) Date

3

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION DISTRICT OF MASSACHUSETTS

In re: ROBERT LOUIS MARRAMA,
Debtor(s)

Case No:

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from schedules A, B, C, D, E, F, G, H, I and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts from Schedules D, E, and F to determine the total amount of the debtor's liabilities.

NAME OF SCHEDULE	ATTACHED	NO. SHEETS	ASSETS	LIABILITIES	OTHER
A — Real Property	Yes	1	300,000.00		
B — Personal Property	Yes	2	10,278.00.		
C — Property Claimed as Exempt	Yes	1			
D — Creditors Holding Secured Claims	Yes	2		575,404	
E — Creditors Holding Unsecured Priority Claims	Yes	2		46,176.39	
F — Creditors Holding Unsecured Nonpriority Claims	Yes	4		231,813.00	
G — Executory Contracts and Unexpired Leases	Yes	1			
H — Codebtors	Yes	1			
I — Current Income of Individual Debtor(s)	Yes	1			5762
J — Current Expenditures of Individual Debtor(s)	Yes	1			4926
Total number of sheets in all Schedules >		16			
		Total Assets >	310,278		
			Total Liabilities >	853,393.39	

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE A- REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a co-tenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether husband, wife, or both own the property by placing an "H","W","J", or "C" in the third column labeled "Husband, Wife, Joint or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G-Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a security interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim."

If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C—Property Claimed as Exempt.

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSB WIFE JOINT COM.	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
Residence in Gloucester, MA	Fee simple		300,000	750,000 including mortgages and attachments
			300,000	TOTAL

RM

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE B— PERSONAL PROPERTY

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "X" in the appropriate position in the column labeled "None." If additional space is needed in any category, attach a separate sheet property identified with the case name, case number, and the number of the category. If the debtor is married, state whether husband, wife, or both own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor is an individual or a joint petition is filed, state the amount of any exemptions claimed only in Schedule C— Property Claimed as Exempt.

Do not list interests in executory contracts and unexpired leases on this schedule. List them in Schedule G— Executory Contracts and Unexpired Leases.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property."

TYPE OF PROPERTY Col A	NONE Col B	DESCRIPTION AND LOCATION OF PROPERTY Col. C	HUSB. WIFE JOINT COMM. Col D	CURRENT MARKET VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTION OF ANY SECURED CLAIM OR EXEMPTION (Col E)
1. Cash on hand.		On hand		100
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.		Fleet Bank		378
3. Security deposits with public utilities, telephone companies, landlords, and others.	X			0
4. Household goods and furnishings, including audio, video, and computer equipment.		Normal & ordinary		7000
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.		Normal & ordinary		200
6. Wearing apparel.		Normal & ordinary		500
7. Furs and jewelry.		Movado watch		2000
8. Firearms and sports, photographic, and other hobby equipment.		Normal & ordinary		100
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.		Life insurance - Sears Home Life No cash value		0
10. Annuities. Itemize and name each issuer.	X			0
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.	X			0
12. Stock and interests in incorporated and unincorporated businesses. Itemize.		Owner of RLM Flooring (out of business)		0
13. Interests in partnerships or joint ventures. Itemize.	X			0

RLM

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

714. Government and corporate bonds and other negotiable and non-negotiable instruments.	X		0
15. Accounts receivable.	X	(RLM Flooring may have, but not likely to be collectible.)	0
16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	X		0
17. Other liquidated debts owing debtor including tax refunds. Give particulars.	X		0
18. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property.		Debtor is 100% beneficiary of Bo-Mar Realty Trust the res of which is real property in Maine in which the debtor intends to live. Trust is a spendthrift trust.	0
19. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X		0
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.		Counterclaims against Citizens Bank; recovery too speculative to add value.	0
21. Patents, copyrights, and other intellectual property. Give particulars.	X		0
22. Licenses, franchises, and other general intangibles. Give particulars.	X		0
23. Automobiles, trucks, trailers, and other vehicles and accessories.	X	(drives 1995 Buick, 86K Miles, owned by girlfriend's father)	0
24. Boats, motors, and accessories.	X		0
25. Aircraft and accessories.	X		0
26. Office equipment, furnishings, and supplies.	X	(RLM Flooring only)	0 0
27. Machinery, fixtures, equipment, and supplies used in business.	X	(RLM Flooring only)	0
28. Inventory.	X	(RLM Flooring only)	0
29. Animals.		Golden Retreiver	0
30. Crops— growing or harvested. give particulars.	X		0 0
31. Farming equipment and implements.	X		0
32. Farm supplies, chemicals, and feed.	X		0
33. Other personal property of any kind not already listed. Itemize.	X		0

__ continuation sheets attached Total $ $10,278.00

(Include amounts from any continuation sheets attached. Report also on Summary of Schedules.)

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE C— PROPERTY CLAIMED AS EXEMPT

Debtor(s) elect(s) the exemption to which the debtor(s) is entitled under:

[ ] 11 U.S.C. §522(b)(1) Federal exemptions provided in 11 U.S.C. §522(d). Note: these exemptions are available *only in certain states*.
[X] 11 U.S.C. §522(b)(2) Exemptions available under applicable nonbankruptcy federal laws, state or local laws where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180 day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law. Specifically, debtor selects the exemptions of the state of: Massachusetts

Description of Property	Specify Law Providing Each Exemption	MAXIMUM Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
Residence in Gloucester, MA	MGL Ch. 188	300,000	200,000
Cash on hand and in bank	MGL Ch 235 & 246	625	478
Household furniture, wearing apparel	MGL Ch 235	No limit	9800
Books, pictures, etc.	MGL Ch. 235	200	200
The beneficial interest in the Bo-Mar Realty Trust is not property of the estate pursuant to 11 USC §541(c).			
Any other exemption to which the debtor may be entitled but has omitted.			

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE D— CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding claims secured by property of the debtor as of the date of filing of the petition. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests. List creditors in alphabetical order to the extent practicable. If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H— Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H," "W," "J," or "C," in the column labeled "Husband, Wife, Joint or Community" (Abbreviated: H,W,J,C).

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is Disputed, place an "X" in the column labeled Disputed. You may need to place an X in more than one of these three columns.

Report the total of all claims listed on this Schedule D in the box labeled "Total" on the last sheet of the completed Schedule. Report this total also on the Summary of Schedules.

Creditor's Name and Mailing Address Including Zip Code	CODEBTOR	H W J C	Date Claim Was Incurred, Nature of Lien, and Description and Market Value of Property Subject to Lien	CONTINGENT	UNLIQUIDATED	DISPUTED	Amount of Claim Without Deducting Value of Collateral	Unsecured Portion If Any
Acct No: Citizens Bank C/o Jack J. Mikels & Associates 1 Batterymarch Park Quincy, MA 02269			7/24/02 -Attachment from Suffolk Superior Ct			X	250,000	250,000 (subject to avoidance)
Acct No: Mass. Dept of Revenue Bankruptcy Unit PO Box 9486 Boston, MA 02205-9486			2/12/02 - Tax lien				5,143.12	0
Acct No: Salem Five Cents Savings Bank C/o Riemer & Braunstein 3 Center Plaza Boston, MA 02108			10/9/02 - Attachment			X	21,000	21,000 (subject to avoidance)
Acct No: Camelot Financial 525 Worcester Street Wellesley, MA 02181			Mortgage			X	Unknown	
Acct No: Presidential Financial Corp. 800 Hingham St. 2 North Rockland, MA 02370			Mortgage Disputed due to refinance but discharge not recorded			X	Unknown	
Acct No: MIT Lending 687 Highland Avenue Needham Heights, MA 02492			Mortgage Disputed due to refinance but discharge not recorded			X	Unknown	

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

Acct No: Frederick A. Ciampa C/o Russell S. Channon, Esq. 25 Kenoza Avenue Haverhill, MA 01831			Attachment - Lowell Dist Ct.			X	22,000	22,000 (subject to avoidance)
Acct No: EIC Development LLC PO Box 179 Boxford, MA 01921			Attachment			X	142,261.59	142,261.59 (subject to avoidance)
Acct No: Fairbanks Capital Corporation 3815 S. West Temple Salt Lake City, UT 84115			Mortgage Disputed due to refinance but discharge not recorded			X	0	
Acct No: 0012724068 Bank One Attn: Customer Service PO Box 26963 Greensboro, NC 27419-6963			Mortgage on ME property				135000	0
Acct No:							0	
Acct No:							0	
Acct No:							0	
							$575,404.71	TOTAL

(Report total also on Summary of Schedules)

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE E—CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity in the appropriate schedule of creditors, and complete Schedule HC Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an X in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. ' 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4,300* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. ' 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. ' 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to a maximum of $4,300* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. ' 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to a maximum of $1,950* for deposits for the purchase, lease, or rental of property or services for personal, family or household use, that were not delivered or provided. 11 U.S.C. ' 507(a)(6).

☐ **Alimony, Maintenance or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance or support, to the extent provided in 11 U.S.C. ' 507(a)(7).

☑ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, custom duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. ' 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. ' 507(a)(9).

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

* Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced after the date of adjustment.

Creditor's Name and Mailing Address Including Zip Code	CODEBTOR	HWJC	Date Claim Was Incurred, and Consideration for Claim	CONTINGENT	UNLIQUIDATED	DISPUTED	Total Amount of Claim	Amount Entitled to Priority
Acct No: Clerk, City of Gloucester 9 Dale Avenue Gloucester, MA 01930			Property tax NOTICE ONLY				0	
Acct No: Internal Revenue Service Special Procedures Function PO Box 9112 - JFK Bldg. Boston, MA 02203			NOTICE ONLY				0	
Acct No: Town of York York, ME			NOTICE ONLY				0	
Acct No: Mass Dept of Employment & Training Hurley Building 19 Staniford Street Boston, MA 02114-2566			Tax - reduced to judgment	X		X	46176.39	
Acct No:								
Acct No:								
							$46,176.39	TOTAL

(Report total also on Summary of Schedules)

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE F— CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or property of the debtor, as of the date of the filing of the petition. Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use continuation sheets.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity in the appropriate schedule of creditors, and complete Schedule H— Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "HWJC" for "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "CONTINGENT." If the claim is unliquidated, place an "X" in the column labeled "UNLIQUIDATED." If the claim is disputed, place an "X" in the column labeled "DISPUTED." You may need to place an X in more than one of these three columns. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Report this total also in the Summary of Schedules.

Creditor's Name and Mailing Address Including Zip Code	CODEBTOR	HWJC	Date Claim Was Incurred And Consideration for Claim If Claim is Subject to Setoff, so State	CONTINGENT	UNLIQUIDATED	DISPUTED	Amount of Claim
Acct No: John F. Cuffen, Esq. 42 Eighth Street, Suite 1000 Charlestown Navy Yard Boston, MA 02129			Legal services				82,000
Acct No: All Checks Cashed, Inc. 595 Washington Street Dorchester, MA 02124			Small claims action				550
Acct No:372713982861005 American Express C/o United Recovery Systems 5800 North Course Drive Houston, TX 77072			Credit card AMOUNT OF CLAIM UNKNOWN				0
Acct No: Mohawk Carpets C/o Capstone 2024 Powers Ferry Road Ste 150 Atlanta, GA 30339			Possible personal liability for corporate debt AMOUNT OF CLAIM UNKNOWN	x			0
Acct No: The Giroux Companies C/o Paul S. Kaurman, Esq. 482 Broadway Somerville, MA 02145			Collection matter				438
Acct No: 20021153 Shaw Industries, Inc. C/o Cohn & Dussi, LLC 25 Burlington Mall Road 6th Floor Burlington, MA 01803-4158			Possible personal liability for corporate debt	X			14730
Acct No: 103593201 Feinberg Campbell & Zack, PC 177 Milk Street, Suite 300 Boston, MA 02109			Possible personal liability for corporate debt; claim against bond - AMOUNT OF CLAIM UNKNOWN	X			0
Acct No: Wells Fargo Financial Leasing C/o Commercial Collections, Inc PO Box 207 Buffalo, MN 55313-0207			Possible personal liability for corporate debt	X			945

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

Acct No: Home Depot USA C/o Carter Business Service, Inc. 12 Teal Road Wakefield, MA 01880			Possible personal liability for corporate debt	X			182
Acct No: Paychex C/o Corporate Collection Services PO Box 17938 Rochester, NY 14617-0938			Possible Personal Liability for corporate debt	X			427
Acct No: Shaw Industries, Inc. CST Incorporated PO Box 33127 Louisville, KY 40232-3127			Possible Personal Liability for corporate debt	X			14730
Acct No: Colony Communications Inc 36 Colony Road Lexington, MA 02420			Possible Personal Liability for corporate debt	X			1510
Acct No: Mary Passino/Small Business Aide PO Box 4200 Peabody, MA 01960			Small claims action	X			3600
Acct No: Mass Inc. C/o UMA World-wide Collections 7-11 South Broadway White Plains, NY 10602-0829			Possible Personal Liability for corporate debt	X			2460
Acct No:5329 0563 3660 7671 MBNA America PO Box 15026 Wilmington DE 19850-5026			Credit card				6271
Acct No: 5369-9332-6905-8471 Chase Bankcard Services PO Box 15583 Wilmington, DE 19886-1194			Credit card				4051
Acct No: 5369 9332 6905 8471 Shell master Card PO Box 15918 Wilmington, DE 19850-5918			Credit card				4052
Acct No: 5490 9928 7748 0859 Boston Red Six Baseball Club MBNA America PO Box 15026 Wilmington, DE 19850-5026			Credit card				2622
Acct No: 4271 3820 7764 8844 Citicard PO Box 6062 Sioux Falls, SD 57117			Credit card				8053
Acct No: 5490 99950 1211 8151 MLB-Atlanta Braves PO Box 15026 Wilmington, DE 19850-5026			Credit card				1133
Acct No: 6011-0018-2054-4189 Discover Card PO Box 15184 Wilmington, DE 19850-5184			Credit card AMOUNT OF CLAIM UNKNOWN				0
Acct No: 4621 2013 2002 2101 The Associates Credit Card Services PO Box 142319 Irving, TX 750141-2319			Credit card				33

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

Acct No: 378203056521002 American Express Travel Related Svcs C/o Nationwide Credit, Inc. 5230 Washington Street West Roxbury, MA 02132			Credit card				5182
Acct No: 4271 3820 7764 8844 The Sony Card Box 6062 Sioux Falls, SD 57117			Credit card				7771
Acct No: 211189485-AM Arbella Mutual Dun & Bradstreet Receivables PO Box 280431 East Hartford, CT 06128-0431			Credit card				139
Acct No: 0007972820002374411 Staples Credit Card Plan C/o Citicorp Credit Services PO Box 9098 Des Moines, IA 50368-9098			Credit card				928
Acct No: 3727-655985-12000 American Express Customer Service PO Box 297804 Ft Lauderdale, FL 33329-7804			Credit card				295
Acct No: 00216034817 Airborne Express PO Box 662 Seattle, WA 98111-0662			Credit card				25
Acct No: 2817153 Nextel Communications C/o First Revenue Assurance PO Box 5818 Denver, CO 80217			Credit card				12718
Acct No: 5369-9332-6905-8471 Arbella Indemnity C/o Morrison Law Offices 100 Cummings Center, Ste 232C Beverly, MA 01915			Insurance				41944
Acct No: 0557-081759 Ryder Transportation Svcs PO Box 96723 Chicago, IL 60693			Possible personal liability on corporate debt	X			1000
Acct No: 1645-0869-86-8 Pitney Bowes 2225 American Drive Neenah, WI 54956-1005			Possible personal liability on corporate debt	X			205
Acct No: D92087 Freudenberg Building Systems C/o NCO Financial Systems PO Box 41417 Philadelphia, PA 19101			Possible personal liability on corporate debt	X			6252
Acct No: 05014247442005 Mass Electric Co. C/o Stevens Business Service PO Box 1232 Lowell, MA 01853			Possible personal liability on corporate debt	X			273
Braun's Express 10 Tandem Way Hopedale, MA 01747			Possible personal liability on corporate debt	X			1400
Acct No: 5369-9332-6905-8471 Braun's Express 10 Tandem Way Hopedale, MA 01747			Possible personal liability on corporate debt	X			1400

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

Acct No: 05014247544003 Mass Electric C/o Gragil Associates, Inc. PO Box 544 Rockland, MA 02370-0544			Possible personal liability on corporate debt	X			1378
Acct No: 16450869868 Pitney Bowes - Purchase Powers C/o Caine & Weiner PO Box 8500 Van Nuys, CA 91409-8500			Possible personal liability on corporate debt	X			1400
Acct No: Mass General Hospital C/o ProMedical, LLC PO Box 310 Bedford, MA 01730-0310			Possible personal liability on corporate debt	X			1076
Acct No: 477746 NRF Distributors PO Box 2467 Augusta, ME 04338-2467			Possible personal liability on corporate debt	X			320
Acct No: Hoboken Wood Floors 181 Campanelli Pksy Stoughton, MA 02072			Possible personal liability on corporate debt	X			0
Acct No: L. Bornstein & Assoc. 321 Washington Street Somerville, ME 02143			Possible personal liability on corporate debt	X			0
Acct No: Dal-tile 1150 Hempstead Road Houston, TX 77092			Possible personal liability on corporate debt	X			0
Acct No: 477746 Belknap White Group 111 Plymouth Street Mansfield, MA 02048			Possible personal liability on corporate debt	X			320
Acct No: Blue Ridge Carpet 1546 Progress Road Ellijay, GA 30540			Possible personal liability on corporate debt - amt unknown	X			0
Acct No: Feeley & Driscoll CPA 200 Portland Street Boston, MA 02114			Possible personal liability on corporate debt - amt unknown	X			0
Acct No: Eastern Bank Loan Dept 1 Eastern Place Lynn, MA 01901			Possible deficiency on car loan	X			0
Acct No: Toyota Motor Credit PO Box 371339 Pittsburgh, PA 15250-7339			Possible personal liability on corporate debt - amt unknown	X			0
Acct No. CNA Surety CNA Plaza, 13 South Chicago, IL 60685-0001			Possible personal liability on corporate debt - amt unknown	X			0
Acct No: Dico Container Co. 166 Lafayette Road Salisbury, MA 01952			Possible personal liability on corporate debt - amt unknown	X			0
							$231,813.00 TOTAL

(Report total also on Summary of Schedules)

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE G— EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests.

State nature of debtor's interest in contract, i.e, "Purchaser," "Agent" etc. State whether the debtor is lessor or lessee of a lease.

Provide the name and complete mailing address of all other parties to each lease or contract described.

NOTE: a party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors.

Name and Mailing Address, Including Zip Code, of Other Parties to Lease or Contract	Description of Contract or Lease and Nature of Debtor's Interest. State Whether Lease is for Nonresidential real property. State Contract Number of any Government Contract
NONE	

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE H— CODEBTORS

Provide the information requested concerning any person or entity, other than a spouse in a joint case, that is also liable on any debts listed by debtor in the schedules of creditors. Include all guarantors and co-signors. In community property states, a married debtor not filing a joint case should report the name and address of the nondebtor spouse in this schedule. Include all names used by the nondebtor spouse during the six years immediately preceding the commencement of the case.

Name and Address of Codebtor	Name and Address of Creditor
NONE	

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE I— CURRENT INCOME OF INDIVIDUAL DEBTORS

The column labeled "spouse" must be completed in all cases filed by joint debtors and by a married debtor in a Chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status: Divorced	Dependents of Debtor and Spouse		
	Names (Debtor pays child support, children not living with him)	Age	Relationship
	Jennifer	16	Daughter
	Jeana	13	Daughter

EMPLOYMENT:	Debtor	Spouse
Occupation, Name of Employer:	Capital Carpet & Flooring	
How long employed:	1.5 months	
Address of employer:	Woburn, MA	

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (Pro rate if not paid monthly)	8600	
Estimated monthly overtime	0	
SUBTOTAL	0	
	8600	
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and Social Security		
b. Insurance		
c. Union dues		
d. Other (Specify)		
SUBTOTAL OF PAYROLL DEDUCTIONS	2838	
TOTAL NET MONTHLY TAKE HOME PAY	5762	
Regular income from operation of business/profession/farm (attach statement)		
Income from real property		
Interest and dividends		
Alimony, maintenance, or support payments payable to the debtor for the debtor's use or that of the dependents listed above		
Social security or other governmental assistance Specify:		
Pension or retirement income		
Other monthly income (Specify): UNEMPLOYMENT		
TOTAL MONTHLY INCOME	5762	
TOTAL COMBINED MONTHLY INCOME	$ 5762	(Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document. *Debtor formerly owned a flooring business (sales & installation). The company recently failed. The income given is estimated based on a new job which is about to start.*

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

SCHEDULE J— CURRENT EXPENDITURES OF INDIVIDUAL DEBTORS

Complete this schedule by estimating the average monthly expenses of the debtor and the debtor's family. Prorate any payments made bi-weekly, quarterly, semi-annually or annually to show monthly rate.

Rent, home mortgage, or mobile-home lot rent (Gloucester)	Are real estate taxes included? Yes _X_ No ____ Is property insurance included? Yes ____ No _X_	1949
Utilities Electricity and heating fuel		100
Water and sewer		50
Telephone		150
Other utilities: cable tv		19.95
Home Maintenance, repairs, upkeep		100
Food		300
Clothing		50
Laundry, dry cleaning		5
Medical and dental expenses		40
Transportation (not including car payments)		300
Recreation, clubs, entertainment, newspapers, magazines		10
Charitable contributions		10
Insurance (not deducted from wages or inc. in mortgage pmt)	Homeowner's or renter's (Both properties)	127
Life		60
Health		0
Auto		85
Other insurance:		0
Taxes (not deducted from wages or included in home mortgage) Specify: excise		20
Installment payments (in Chapters 12 and 13, do not list payments to be included in the plan)		0
Auto payment:		260
Other payment:		0
Alimony, maintenance, and support paid to others		1290
Payments for support of additional dependents not living at the debtor's home		0
Regular expenses from operation of business, profession, or farm (attach detailed statement)		0
Other expenses:		0
TOTAL MONTHLY EXPENSES (report also on Summary of Schedules)		$4,925.95

RJM

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No:

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of 17 sheets, and that they are true and correct to the best of my knowledge, information and belief.

Date 3-7-03 February 9, 2003 Signature Robert Louis Marrama
ROBERT LOUIS MARRAMA

Date 3 Signature _____

(In joint case, both debtors must sign)

DECLARATION UNDER PENALTY ON BEHALF OF A CORPORATION

I, the _____ (the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership) of the _____ (corporation or partnership) named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that I declare that they are true and correct to the best of my knowledge, information and belief.

Date _____ _____
Signature

_____
(Print or type the name of individual signing for debtor)

(An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.)

Penalty for making a false statement or concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§152 and 3571.

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UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION DISTRICT OF MASSACHUSETTS

In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No.

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under Chapter 12 or Chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1-18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, must also complete Questions 19-25. Each question must be answered. If the answer to any question is "None," or the question is not applicable, mark the box labeled "None." If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

Definitions

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor, general partners of the debtor and their relatives; corporations of which the debtor is an officer, director or person in control; officers, directors, and owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

1. Income from employment or operation of business

State the gross amount of income the debtor has received from employment, trade or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

AMOUNT	SOURCE (if more than one)
2002	RLM Flooring
2001	" "
2000	" "

2. Income other than from employment or operation of business

State the amount of income received by the debtor other than from employment trade or profession, or operation of the debtor's business during the two years immediately preceding the commencement of the case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

AMOUNT	SOURCE
NONE	

3. Payments to creditors

a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must state payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

RM

NONE (on a consensual basis)

b. List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditors who were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments of either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR RELATIONSHIP TO DEBTOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING
NONE			

4. Suits and administrative proceedings, executions, garnishments and attachments

a. List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT/AGENCY AND LOCATION	STATUS OR DISPOSITION
Citizens Bank v. RLM Flooring & Robert Marrama	Collection	Suffolk Superior	pending
Camelot Financial v. Robert Marrama	Soldiers & Sailors	Land Court	completed
Salem 5Cents v. RLM Flooring & Robert Marrama	collection	Somerville D.C.	completed
Mary Passino v. Robert Marrama	collection	Peabody D.C.	completed

(This list does NOT include litigation where only RLM Flooring was named.)

b. Describe all property that has been attached, garnished, or seized under any legal or equitable process within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY
Citizens Bank seized most of the assets of RLM Flooring and also seized or setoff funds in debtor's bank accounts.		

5. Repossessions, foreclosures and returns

List all property that has been repossessed by a creditor, sold at foreclosure sale, transferred through a deed in lieu of foreclosure or returned to a seller within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE, SALE TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY
Citizens Bank (see above)		
Toyota Financing	March, 2003	2000 Lexus 300 (about $40K)
Eastern Bank	March, 2003	2000 Dodge Ram 2500 (about $17K)

6. Assignments and receiverships

a. Describe any assignment of property for the benefit of creditors made within 120 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT
None		

b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated, and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME, LOCATION OF COURT, CASE TITLE AND NUMBER	DATE OF ORDER	DESCRIPTION, VALUE OF PROPERTY

Some property may have been held for Citizens Bank during litigation.

7. Gifts

List all gifts or charitable contributions made within one year immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

None

8. Losses

List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES, AND IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

None

9. Payments related to debt counseling or bankruptcy

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within one year immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR, IF OTHER THAN DEBTOR	AMOUNT OF MONEY, OR DESCRIPTION AND VALUE OF PROPERTY
David G. Baker, Esq. 42 Eighth Street, Suite 1000 Charlestown Navy Yard Boston, MA 02129	1/9/03 & 2/9/03	Total = $1,000

10. Other transfers

List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND RELATIONSHIP OF TRANSFEREE; RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

NONE

11. Closed financial accounts

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold or otherwise transferred within one year immediately preceding the commencement of this case. Include checking, saving, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations and brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT; AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

All accounts at Citizens Bank were closed involuntarily (so to speak) by the bank.

12. Safe deposit boxes

List each safe deposit or other box or depository in which the debtor has or had securities, cash or other valuables within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER INSTITUTION	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY
None			

13. Setoffs

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within 90 days preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF
Citizens Bank (as above)		

14. Property held for another person

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY
None		

15. Prior address of debtor

If the debtor has moved within two years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY
None		

16. Spouses and Former Spouses

If the debtor resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the six-year period immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME
N/A

17. Environmental Information

For the purposes of this question, the following definitions apply:

An "Environmental Law" means any federal, state or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or materials into the air, land, soil, surface water, groundwater, or other medium, including but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

A "Site" means any location, facility, or property as defined by any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including but not limited to, disposal sites.

A "Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

DM

a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and , if known, the Environmental Law.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

N/A

b. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

N/A

c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

N/A

18. Nature, location and name of business

a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the business, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship or was a self-employed professional within the six years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the business, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the six years immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the six years immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES
RLM Flooring	04-		Floor installation	1995-2002
C&M Enterprises	04-		Limo service	1995 - ?

b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. ' 101.

NAME	ADDRESS

None

The following questions [numbers 19 - 25] are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within six years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting securities of a corporation, a partner, other than a limited partner, of a partnership; a sole proprietor, or otherwise self-employed.

19. Books, records, and financial statements

ALL RECORDS FOR RLM FLOORING ARE IN THE CUSTODY OF CITIZENS BANK, PER ORDER OF THE SUPERIOR COURT.

a. List all bookkeepers and accountants who within the two years immediately preceding the filing of this bankruptcy case, kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATE SERVICES RENDERED

DM

Main Street Winchester	
Feeley & Driscoll Boston, MA	2001
Frederick Ciampa (see schedule F)	2002

b. List all firms or individuals who within the two years immediately preceding the filing of this bankruptcy case have audited the books of account and record, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED
NONE		

c. List all firms or individuals who at the time of commencement of this case were in possession of the books of account or records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the two years immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED
Citizens Bank	Uncertain

20. Inventories

a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market, or other basis)
None		

b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS
CITIZENS BANK HAS ALL RECORDS	

21. Current Partners, Officers, Directors and Shareholders

a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST
N/A		

b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds, 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP
N/A		

22. Former partners, officers, directors, and shareholders

a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL
N/A		

b. If the debtor is a corporation, list all officers or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION
N/A		

23. Withdrawals from a partnership or distributions by a corporation

If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during one year immediately preceding the commencement of this case.

NAME AND ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY
N/A		

24. Tax Consolidation Group

If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the six year period immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER IDENTIFICATION NUMBER
N/A	

25. Pension Funds

If the debtor is not an individual, list the name and federal taxpayer identification number of any pension number to which the debtor, as an employer, has been responsible for contributing at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER IDENTIFICATION NUMBER
N/A	

* * * * * *

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date:

Robert L. Marrama

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. '152 and 3571.

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UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION DISTRICT OF MASSACHUSETTS

In re ROBERT LOUIS MARRAMA,
Debtor(s) Case No:

DISCLOSURE OF COMPENSATION UNDER 11 U.S.C. 329
AND BANKRUPTCY RULE 2016(b)

I certify that I am the attorney for the above named debtor and that the compensation paid or agreed to be paid to me for services rendered or to be rendered in behalf of the debtor in or in connection with a case under title 11 of the United States Code, such payment or agreement having been made after one year before the date of the filing of the petition, is as follows:

$ 1,000 paid, $ 1,500.00 to be paid, that the source of the compensation paid was the debtor, and that the source of the compensation agreed to be paid is the debtor.

This agreement includes Adversary Proceedings, including but not limited to dischargeability complaints. Debtor has agreed to pay an hourly rate of $175.00. If total fee exceeds $2,500, fee will be at that hourly rate and subject to court approval.

I have not agreed to share this compensation with any other person except for a member or regular associate of my law firm, which term includes John F. Cullen, Esq., and Peter C. Lacy, Esq..

Date: 3-7-03

David G. Baker, Esq.
Attorneys for Debtor(s)

FILED
IN CLERK'S OFFICE
2003 MAR 11 P 2:23
BANKRUPTCY COURT
DISTRICT OF MASS.

I have read the foregoing statement of my attorney and agree to the terms stated.

Date: 3-7-03

Robert L. Marrama

(2)

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UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION, DISTRICT OF MASSACHUSETTS AUG11'03 AM 9:14 USB

In re Robert Louis Marrama, Debtor	Docket No.: 03-11987-WCH Chapter 13

NOTICE OF AMENDMENT TO SCHEDULES I AND J

NOW COMES Robert L. Marrama and gives notice pursuant to MLBR 1009-1 of amendment to Schedules I and J, attached. Subsequent to the filing of the original schedules, the debtor obtained full-time regular employment and is no longer self-employed, and also obtained a tenant in his Gloucester property. The amounts stated on this schedule, therefore, reflect actual income as of this date. Schedule J reflects adjustments in expenses based on actual experience post-petition.

Dated: July 14, 2003

Respectfully submitted,
Robert Louis Marrama
By his attorney,

David G. Baker, Esq.
105 Union Wharf
Boston, MA 02109
(617) 367-4260
BBO# 634889

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served the above Notice of Amendment to Schedules I and J upon the persons named below by habd delivery of a true copy of the same to the addresses indicated.

Date: July 15, 2003

David G. Baker

Mark A. DeGiacomo, Esq.
Chapter 7 Trustee
Murtha Collina et al
99 High Street
Boston, MA 02110

Doreen B. Solomon, Esq.
Chapter 13 Trustee
PO Box 8250
Boston, MA 02114

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In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No: 03-11987-WCH AMENDED JULY 15, 2003

SCHEDULE I— CURRENT INCOME OF INDIVIDUAL DEBTORS

AUG11'03 AM 9:15 USBC

The column labeled "spouse" must be completed in all cases filed by joint debtors and by a married debtor in a Chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status:	Dependents of Debtor and Spouse		
Divorced	Names (Debtor pays child support, children not living with him)	Age	Relationship
	Jennifer	16	Daughter
	Jeana	15	Daughter

EMPLOYMENT:	Debtor	Spouse
Occupation. Name of Employer:	Capital Carpet & Flooring	
How long employed:	5 months	
Address of employer:	Woburn, MA	

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (Pro rate if not paid monthly)	8600	
	0	
Estimated monthly overtime	0	
SUBTOTAL	8600	
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and Social Security	2915.23	
b. Insurance		
c. Union dues		
d. Other (Specify)		
SUBTOTAL OF PAYROLL DEDUCTIONS	2915.23	
TOTAL NET MONTHLY TAKE HOME PAY	5684.77	
Regular income from operation of business/profession/farm (attach statement)		
Income from real property	1500	
Interest and dividends		
Alimony, maintenance, or support payments payable to the debtor for the debtor's use or that of the dependents listed above		
Social security or other governmental assistance Specify:		
Pension or retirement income		
Other monthly income (Specify): UNEMPLOYMENT		
TOTAL MONTHLY INCOME	7184.77	
TOTAL COMBINED MONTHLY INCOME	$ 7184.777	(Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document. *Debtor may obtain a second tenant in his Gloucester property.*

AUG11'03 AM 9:14 USB

Form B6J - (Rev. 6/94) 1998 USBC, District of New Hampshire

In re Robert Louis Marrama - AMENDED 7/15/03 Debtor	Case No.: 03-11987-WCH (If known)

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average monthly expenses of the debtor and the debtor's family. Prorate any payments made bi-weekly, quarterly, semi-annually, or annually to show monthly rate.

☐ Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse."

Rent or home mortgage payment (include lot rented for mobile home)	$ 1949
Are real estate taxes included? Yes ✔ No ____	
Is property insurance included? Yes ____ No ✔	
Utilities: Electricity and heating fuel	$ 100
Water and sewer	$ 50
Telephone	$ 70
Other 50	$ 0
Home Maintenance (Repairs and Upkeep)	$ 50
Food	$ 250
Clothing	$ 0
Laundry and dry cleaning	$ 30
Medical and dental expenses	$ 150
Transportation (not including car payments)	$ 0
Recreation, clubs and entertainment, newspapers, magazines, etc.	$ 0
Charitable contributions	
Insurance (not deducted from wages or included in home mortgage payments):	
Homeowner's or renter's	$ 40
Life	$ 69
Health	$ 300
Auto	$ 150
Other	$ 0
Taxes (not deducted from wages or included in home mortgage payments)	$ 0
(Specify) excise	$ 20
Installment payments (In chapter 12 and 13 cases, do not list payments to be included in the	
Auto	$ 250
Other	$ 0
Other	$ 0
Alimony, maintenance, and support paid to others	$ 1290
Payments for support of additional dependents not living at your home	$ 0
Regular expenses from operation of business, profession, or farm (attach detailed statement)	$ 0
Other Mortgage on Maine Property; amount above is Gloucester	$ 1010
TOTAL MONTHLY EXPENSES (Report also on Summary of Schedules)	$ 5828

[FOR CHAPTER 12 AND 13 DEBTORS ONLY]

Provide the information requested below, including whether plan payments are to be made bi-weekly, monthly, annually, or at some other regular interval.

A. Total projected monthly income	$ 7184.77
B. Total projected monthly expenses	$ 5828
C. Excess income (A minus B)	$ 1356.77
D. Total amount to be paid into plan each Month (interval)	$ 1300.00

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In re: ROBERT LOUIS MARRAMA, Debtor(s) Case No: 03-11987-WCH AMENDED JULY 15, 2003

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR AUG 11 '03 AM 9:14 USB

I declare under penalty of perjury that I have read the foregoing amended schedules I and J, consisting of 2 sheets, and that they are true and correct to the best of my knowledge, information and belief.

Date July 14, 2003 Signature _____
ROBERT LOUIS MARRAMA

Date _____ Signature _____

(In joint case, both debtors must sign)

DECLARATION UNDER PENALTY ON BEHALF OF A CORPORATION

I, the _____ (the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership) of the _____ (corporation or partnership) named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that I declare that they are true and correct to the best of my knowledge, information and belief.

Date _____ _____
Signature

_____
(Print or type the name of individual signing for debtor)

(An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.)

Penalty for making a false statement or concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§152 and 3571.

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UNITED STATES BANKRUPTCY COURT, DISTRICT OF MASSACHUSETTS
Proceeding Memorandum/Order of Court

In re: Robert Louis Marrama Case#: 03-11987 Ch: 7

MOVANT/APPLICANT/PARTIES:

1. #50 Verified Notice of Conversion to Chapter 13
   #54 Chapter 7 Trustee's Opposition to Debtor's Verified Notice of Conversion to Chapter 13
   #73 Debtor's Response to Chapter 7 Trustee's Objection to Conversion to Chapter 13
   #63 Citizens Bank of Massahcusetts, Oppositon to Debtor's Verified Notice of Conversion to Chapter 13
   (Baker, Bogdanov, Wirtz)

OUTCOME:

☐ By Agreement of the Parties

_____ Granted - Approved - Sustained
_____ Denied - Denied without prejudice - Withdrawn in open court - Overruled
_____ OSC enforced/released

_____ Continued to: _____ For: _____

_____ Formal order/stipulation to be submitted by: _____ Date due _____
X Findings and conclusions dictated at close of hearing incorporated by reference.

_____ Taken under advisement: Brief(s) due _____ From _____

Response(s) due _____ From _____

_____ Fees allowed in the amount of: $ _____ Expenses of: $ _____

_____ No appearance/response by: _____

_____ DECISION SET OUT MORE FULLY BY COURT AS FOLLOWS:

Conversion denied.

IT IS SO NOTED:

_____
Courtroom Deputy

IT IS SO ORDERED:

William C. Hillman Dated: 8/27/03
William C. Hillman, U.S. Bankruptcy Judge

Supreme Court, U.S.
FILED
AUG 7 - 2006
OFFICE OF THE CLERK

(5)

No. 05-996

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LOUIS MARRAMA,

Petitioner

v.

CITIZENS BANK OF MASSACHUSETTS,
And MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE

Respondents

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The First Circuit Court of Appeals affirmed the decision of the Bankruptcy Appellate Panel for the First Circuit, which affirmed the decision of the Bankruptcy Court for the District of Massachusetts denying the request of the Petitioner, Robert Louis Marrama, to convert his bankruptcy case from Chapter 7 to Chapter 13. The bankruptcy court did so in derogation of the plain language of the statute and of the legislative history. Nonetheless, the Bankruptcy Appellate Panel and the First Circuit Court of Appeals determined that the right to convert a case from one chapter to another, found in 11 USC §706(a), can be denied in the bankruptcy court's discretion if the bankruptcy court determines that the request was made in bad faith. The Bankruptcy Appellate Panel's decision focused on factual determinations, rather than the language of the statute. The First Circuit Court of Appeals focused on statutory construction and determined that although the legislative history says that the right to convert is "absolute", the right can be denied in circumstances such as those presented in this case.

The question presented, therefore, is whether the right to convert a chapter 7 bankruptcy case to another chapter can be denied notwithstanding the plain language of the statute and the legislative history.

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OPINIONS BELOW

The bankruptcy court did not issue a written opinion. The opinion of the Bankruptcy Appellate Panel is reported at Marrama v. Citizens Bank of Massachusetts and DeGiacomo, Trustee (In re Marrama), 313 B.R. 525 (1st Cir. BAP 2004). The decision of the Bankruptcy Appellate Panel denying a motion for rehearing was not reported. The opinion of the First Circuit Court of Appeals is reported under the same title at 430 F. 3d 474 (1st Cir. 2005).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

The opinion of the First Circuit Court of Appeals was rendered on October 31, 2005. This Court granted the Petition for Certiorari on June 12, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 11. BANKRUPTCY · UNITED STATES CODE
Chapter 7. Liquidation
Subchapter I. Officers and Administration

11 USC §706. Conversion
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.
(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

STATEMENT OF THE CASE

Petitioner Robert Louis Marrama commenced a bankruptcy case under Chapter 7 of Title 11, United States Code, on March 11, 2003. Respondent Mark DeGiacomo (hereinafter "DeGiacomo") was appointed trustee, and respondent Citizens Bank was listed as a creditor. The Meeting of Creditors required by 11 USC §341 commenced on April 24, 2003, and was continued several times, finally concluding on November 18, 2003. At the first meeting, DeGiacomo recommended certain amendments to the schedules, which eventually were made.

The bankruptcy case resulted from the breakdown of a business relationship that Marrama had with respondent Citizens Bank, or its predecessors, for about 14 years. Citizens had provided a line or lines of credit to Marrama's business, RLM Flooring, Inc. At some point, Marrama requested an increase in his credit line to help him cope with a temporary cash flow problem. In response, Citizens refused the request and instead called in its note, demanding immediate payment in full. When payment was not forthcoming, Citizens commenced litigation in the Massachusetts Superior Court for Suffolk County. During the course of pre-trial proceedings, Citizens obtained permission of the Superior Court to take possession of all of RLM's assets, including accounts receivable, thereby effectively shutting down the business. Having been rendered unemployed, Marrama sought bankruptcy relief in order to gain "breathing room" and develop a source of income. Being then unemployed, Marrama did not qualify to file under Chapter 13, as he did not have a regular income as required by 11 USC §109(e). The state court litigation never went to trial in the state court.

Among Marrama's assets was a "summer home" in York, Maine, and his permanent residence in Gloucester,

Massachusetts. Although the Maine property was owned in a spendthrift trust, the bankruptcy court determined that the trust was not valid or was revocable[1]. Accordingly, respondent DeGiacomo, as chapter 7 trustee, liquidated that property. On the date of the bankruptcy petition, Marrama was residing in the Maine property. Thus, Citizens took the position that Marrama's homestead exemption for the Gloucester property, claimed pursuant to state law, was invalid. In a published decision, In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004), the bankruptcy court overruled Citizens' position. Thus Marrama presently is living in Gloucester, Massachusetts, and that property is exempted from the bankruptcy estate.

Once Marrama was able to find employment[2], he sought to convert the case to Chapter 13 so that he could cure the arrears on his mortgages that arose due to the financial problems that arose from the Citizens litigation, and thereby keep his homes. Both respondents objected to the conversion, claiming essentially that the request was made in bad faith; there was no allegation that Marrama was not qualified to be a debtor under chapter 13. The bankruptcy court, alluding to one of its own published decisions, denied conversion. On intermediate appeal, the Bankruptcy Appellate Panel affirmed, and denied a motion for rehearing. Fortunately, Marrama was able to resolve the mortgage foreclosure issues outside of bankruptcy, and at the time the

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[1] This statement results from the fact that the bankruptcy court allowed DeGiacomo's motion to revoke the trust. The motion was allowed without a hearing, so the bankruptcy court's reasoning is not known with certainty, but that the bankruptcy court so determined is a reasonable inference from allowance of the motion.

[2] His family has been in the flooring business for at least two generations. Thus he was able to find employment with a brother's flooring company.

Petition for Certiorari was granted, he was still living in Gloucester Massachusetts.

A timely appeal to the First Circuit followed. The First Circuit affirmed. A timely Petition for Certiorari was filed in this court, and was granted on June 12, 2006.

SUMMARY OF ARGUMENT

The Bankruptcy Code provides a comprehensive scheme whereby persons, both natural and corporate, may obtain a release, called a "discharge", from the legal obligation to pay most of their debt. Furthermore, it provides an orderly, balanced and systematic method of providing a return to creditors, where possible, while still permitting a debtor to retain certain property in order to enhance the debtor's future prospects.

The Congressional scheme provides essentially two types of bankruptcy: liquidation and reorganization. The various chapters all permit, in essence, a debtor who has filed under one chapter to convert to another chapter. These provisions generally allow one such conversion as a matter of right, subject to certain explicit conditions.

In the statutes that it enacts, Congress is presumed to say what it means and mean what it says. While it cannot be disputed that judges are charged with applying the law to the cases before them – not always an easy task - where a result is mandated by statute, the judge is bound to apply the statute as written, without exception, however inappropriate or distasteful a judge may find the result.

In this case, the bankruptcy judge decided that Marrama had requested conversion from chapter 7 to chapter 13 in bad faith. The determination was made by the bankruptcy judge summarily, i.e., without an evidentiary hearing, based on claims of bad faith made by the chapter 7 trustee and Citizens Bank.

On appeal before the Bankruptcy Appellate Panel for the First Circuit and again in the First Circuit Court of Appeals, Marrama contended that the judge erred by exercising a discretion he did not have, however both courts disagreed and affirmed the bankruptcy court. A timely Petition for Certiorari was filed and granted.

ARGUMENT

I. THE STATUTORY SCHEME OF BANKRUPTCY

In Title 11 of the United States Code, popularly known as the Bankruptcy Code, Congress has set forth a comprehensive scheme whereby persons, both natural and corporate, may obtain a release, called a "discharge", from the legal obligation to pay most of their debt. Although the United States Constitution authorizes Congress to establish uniform laws respecting bankruptcy, Congress did not do so until 1800. *See* Central Virginia Community College v. Katz, 126 S.Ct. 990, 163 L.Ed. 2d 945 (2006) (providing a brief but comprehensive history of bankruptcy in the United States). The law has been amended many times since then, including major changes in 1994 and 2005. The law applicable to this case is that adopted in 1994, as the petition was filed prior to the 2005 amendments.

This scheme has biblical roots[3], and reflects a public policy that encourages those who have faltered economically, and helps them to return to being productive and contributing members of society to the best of their ability. This court has stated that "[i]t is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713 (1915), *cited in* Local Loan Co. v. Hunt, 292 US 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) *and other cases too numerous to list.* In addition, it provides an orderly, balanced and systematic method of providing a return to creditors,

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[3] *See, e.g.,* Deuteronomy 15.

where possible, while still permitting a debtor to retain certain property in order to enhance the debtor's future prospects. *See* U.S. v. Security Indus. Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed. 2d 235 (1982) (Blackmun, J, concurring in the judgment)[4]. The system makes no guarantees to anyone, but inherently gives hope to those who come within its reaches. Congress has determined that certain debts, such as for child support, alimony, and most taxes, cannot be discharged[5]. In addition, for those who abuse its provisions, the Bankruptcy Code provides for the discharge to be denied[6]. In other parts of the United States Code, certain acts in connection with a bankruptcy case are defined as criminal[7]. Thus, Congress has determined when and how a debtor (or, as the case may be, a creditor) should be punished.

The Congressional scheme provides essentially two types of bankruptcy: liquidation and reorganization. The liquidation chapter is chapter 7; the reorganization chapters are chapter 11 and chapter 13. Although natural persons can be debtors[8] in chapter 11, the procedures and costs associated with chapter 11 make it impractical for most natural persons. In chapter 13, however, the reorganization procedures are

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[4] '...the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities ...". The Bankruptcy Code permits an individual (i.e., not a corporate debtor) to exempt certain property, *see* 11 USC §522. Property claimed as exempt is exempt unless a party in interest timely objects to the exemption and the objection is sustained. Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). The exemption has the effect of removing the property from the bankruptcy estate, Owen v. Owen, 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed. 2d 350 (1991), thus statutorily depriving the chapter 7 trustee the opportunity to administer the property.

[5] *See* 11 USC §523.

[6] *See, e.g.*, 11 USC §727.

[7] *See, e.g.*, 18 USC §156 *et seq.*

[8] Eligibility for the various chapters is set forth in 11 USC §109.

simpler and the cost significantly less. Corporations are not permitted to be debtors in chapter 13[9].

The various chapters all provide, in essence, that a debtor who has filed under one chapter has discretion to convert to another chapter once as a matter of right, subject to certain explicit conditions. For example, a debtor in chapter 7 apparently may convert, as of right, to any other chapter so long as that debtor is eligible to be a debtor in that chapter and the case has not been converted previously. After the first conversion, leave of the bankruptcy judge is required for subsequent conversions.

II. STATUTORY CONSTRUCTION AND THE STATUTE AT ISSUE

Section 706 of the Bankruptcy Code, quoted in full beginning on page 1, may be summarized as follows: a chapter 7 debtor may convert the case to one under chapter 11, 12, or 13 at any time so long as the case has not been converted previously and the debtor is qualified to be a debtor under that chapter; the right to convert a case cannot be waived. If a party in interest (presumably other than the debtor) requests conversion, the court may convert the case to chapter 11 at any time. However, the court may not convert a case to chapter 12[10] or 13 unless the debtor requests such conversion.

It is a fundamental canon of statutory construction that in the statutes that it enacts, Congress is presumed to say what it means and mean what it says, and if the words of a statute are unambiguous, the judicial inquiry is complete. *See, e.g.,* Connecticut Nat. Bank v. Germain 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed. 2d 391 (1992). Because Congress

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[9] Id.

[10] Chapter 12 is also a reorganization chapter but at all times relevant hereto was limited to "family farmers" as defined by the statute.

does not always speak with crystalline clarity, however, and because Congress cannot reasonably be expected to anticipate every factual scenario that may arise in connection with a statute, it is sometimes necessary to look to the Legislative History. Id. Ultimately, judges are required to interpret statutes in a way that avoids an absurd result, or a result that is plainly contrary to Congressional purpose. Nonetheless, where a statute is clear, and a rational, reasonable interpretation and application of the statute is possible based on the plain language of the statute, judges should not be free to interpret the statute in a way that suits their view of the parties before them. However inappropriate or distasteful a judge may find a certain result, where that result is mandated by statute, the judge is required to apply the statute as written, without exception. Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000). As a result, when Congress specifies the party to a bankruptcy case who may do something, only that party may do it. In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003).

It is generally held that the use of the word "may" implies permission or discretion. *See* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999), *citing* Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947). "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In re Hart, 328 F.3d 45 (1st Cir. 2003) (*quoting, in a bankruptcy case,* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quotation marks and citation omitted). Thus, where Congress says "the debtor" in one place and "the court" (or some other actor) in another, it must be presumed that Congress intentionally made the distinction.

III. THE DECISIONS BELOW

In this case, the bankruptcy judge decided that Marrama had requested conversion from chapter 7 to chapter 13 in bad faith, and decided to punish him by denying his absolute right to convert. JA pg. 35a. No question was raised as to his eligibility to be a debtor in chapter 13 based on the statutory definition of eligibility[11]. The determination was made by the bankruptcy judge summarily, i.e., without an evidentiary hearing, based on claims of bad faith made by the chapter 7 trustee and Citizens Bank. The bankruptcy judge concluded (incorrectly[12]) that Marrama had attempted to conceal property from the trustee and that this constituted bad faith, warranting denial of Marrama's request for conversion to chapter 13. *See* Id.

The Bankruptcy Appellate Panel for the First Circuit did not engage in any extended analysis of the statute, but merely assumed that its interpretation was correct, relying on its own prior decisions and those of other courts that had similarly held. Pet. at pg. 9. On further appeal to the First Circuit Court of Appeals, the court performed the necessary statutory analysis, and concluded that although the statute was not ambiguous, the court nonetheless "would look to the statute's 'historical context, its legislative history, and the underlying policies that animate its provisions." Marrama v. Citizens Bank of Massaachusetts and DeGiacomo, Trustee, 430 F.3d 474 at 4; *Pet. at pg. 29.*

The court then examined the Legislative History, which says:

Subsection (a) of this section gives the debtor the one-

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[11] *See* 11 USC §109(e).

[12] It is surely a foregone conclusion that the Respondents will argue that the facts warranted the bankruptcy judge's decision, so the Petitioner reserves the right to argue the point as well.

> time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. Finding the term "absolute" to be "problematic, if taken out of context, in that it implies that the debtor's conversion right is unconditional", the court noted that the statute, itself, contained "numerous" conditions that might defeat a debtor's motion to convert. *Pet. at pg. 37.* The court only pointed to one, however, that being that the right is limited to one conversion "as a matter of right". Notwithstanding the finding that the statute is not ambiguous and disregarding the crystal-clear language of the Legislative History, the court then proceeded to create a judicial exception to the right, and to limit the exercise of that right to debtors that the courts deemed to be "honest" in order to prevent debtors from abusing or manipulating the bankruptcy process. *Pet. at pg. 38.*

Marrama respectfully suggests that the term "absolute" does not *imply* anything. Instead, it is a particularly crystal clear statement of Congressional intent and purpose. It gives discretion to a debtor – and *only* to a debtor – voluntarily to convert a case from Chapter 7 to either Chapter 11, 12, or 13 one time, for any reason, and permits judicial inquiry into the conversion *only* for a determination of whether the debtor has previously converted the case from one chapter to another and whether the debtor is qualified to be a debtor in that chapter. There is nothing in the statute or the Legislative History which affords discretion

to a judge to refuse conversion on any other basis. In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005); In re Croston, 313 B.R. 447 (9th Cir. BAP 2004); In re Miller, 303 B.R. 471 (10th Cir. BAP 2003).

There is nothing irrational or absurd about Congress giving discretion to a debtor to decide how to proceed in a bankruptcy case. For example, in a chapter 7 case, the debtor must choose whether to redeem or surrender property subject to security interest, or to reaffirm the debt. 11 USC §521. In a chapter 13 case, only the debtor can file a plan; creditors and the court are not among the universe of parties who may file a plan. 11 USC 1321; In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003). While a plan *must* have certain provisions, the debtor has discretion to decide what other provisions the plan will contain. Id.

There is also nothing irrational or absurd about Congress dictating a certain result or denying a judge discretion. If a chapter 13 plan contains the mandatory provisions and otherwise complies with the Bankruptcy Code, the bankruptcy judge *must* confirm the plan[13]. The only issue the bankruptcy judge decides is whether the plan complies with the statute; she may not alter the plan terms to suit her opinion regarding the debtor's conduct. Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000).

Similarly, in section 706(c), Congress stated that "the court *may not* convert a case ... unless the debtor requests such conversion." (Emphasis added.) Congress has stated that the phrase "may not" is "prohibitive, and not permissive". 11 USC §102(4). Clearly Congress has

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[13] 11 USC §1325 provides that "the court shall confirm a plan if" it complies with the statute. (Emphasis added.) As noted above, the use of the word "shall" implies a command leaving no room for discretion. The judge's function is limited to determining whether the plan complies. *See* Muessel, *infra*.

dictated the result that obtains when a party other than the debtor seeks to convert a chapter 7 case to chapter 13, and denied the bankruptcy judge discretion to allow an involuntary conversion to chapter 13[14].

Notwithstanding the seemingly crystal clear Congressional directive, whether found in the statute or the Legislative History, some courts have applied a "judicial gloss" to the statute. In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995) (holding that the right to convert from Chapter 7 to Chapter 11 is absolute; collecting cases). The Sixth Circuit, for example, disagreed with both the Fifth Circuit Court of Appeals and the Tenth Circuit Bankruptcy Appellate Panel. In re Copper, 426 F.3d 810 (6th Cir. 2005). The Sixth Circuit expressly recognized the split of authority and that "fair arguments can be made for either position." Nonetheless, the Sixth Circuit concluded that conversion may be denied in the absence of good faith.

Most cases – on both sides of the question – rely on a decision from the Fifth Circuit. Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989). That court was regrettably imprecise in that it concluded that the right to convert, as indicated by the statute and its legislative history, is absolute, but in the very next sentence, seemed to give courts discretion to deny conversion because it notes that "the courts refuse to interfere with that right in the absence of extreme circumstances."

Recently, however, the Fifth Circuit had occasion to revisit the issue and to clarify the Martin decision. In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005). Although this appears to be an otherwise unpublished decision, it is directly on point and highly material to the present petition, and should be

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[14] The 2005 amendments to the Bankruptcy Code modified this such that a debtor may *consent* to conversion requested by another party, but still denies judges discretion to allow involuntary conversion to chapter 13.

considered by this Court. In this decision, the Fifth Circuit recognized that there is *dicta* in the Martin decision that could be interpreted otherwise, but the court nonetheless clarified its view that "[t]he statutory language makes it clear that the right to convert is absolute and unqualified." The court thereby joined what appears to be a slight majority of courts holding that the right is absolute and unfettered.

This majority, however slim, adheres to the plain language of the statute, which provides only two bases for denying conversion, and to the Legislative History, which explicitly says that the one-time right to convert is absolute. The First Circuit was wrong to impose an additional judicially-created exception which would deny conversion based on a bankruptcy judge's perception of the debtor's motivation, i.e., to punish the debtor for perceived abuses. Congress has mandated that when a debtor requests conversion from chapter 7 to another chapter, the case *must* be converted if the debtor is qualified for relief under that chapter and has not previously requested conversion.

The decisions below erred in creating judicial exceptions to the Congressional mandate. As other circuits have determined, the right to convert once is absolute and may not be abrogated except by Congress in the two circumstances expressly stated by Congress in the statute.

IV. THE BRIGHT-LINE RULE CREATED BY CONGRESS

In creating that mandate, Congress has established a bright-line rule that must be obeyed. The chaos that results when that bright-line rule is not obeyed – i.e., when courts create their own subjective exceptions to the rule made by Congress – is made evident by the extraordinary disparity in application of the exception to the facts in reported cases. It is a seemingly innocent and well intentioned rule; if a debtor requests conversion in bad faith, then the court may deny

conversion. Like pornography, however, "bad faith" is easier to identify than to define[15].

That the absolute right to convert from chapter 7 to another chapter may be denied in "extreme circumstances" appears to have its genesis in a case from the bankruptcy court for the District of Utah. In re Calder, 93 B.R. 739 (Bkrtcy.D.Utah. 1988). In that case, the debtor was an attorney who had filed several cases and, in the view of the bankruptcy court, was abusing the system solely to gain an advantage against his creditors and did not have a sincere desire to pay his creditors. The bankruptcy court invoked its power under 11 USC §105[16] to deny conversion in order to

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[15] "Bad faith" is presumably the opposite of "good faith". Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000), *supra*. "The term "good faith" is not easily defined and the requirement is not capable of pragmatic and mechanical application. In the last analysis it is the same as pornography, one cannot define it but will readily recognize it when one sees it." In re Noll, 172 B.R. 122 (Bkrtcy.M.D.Fla. 1994). *citing* Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J.)

[16] Section 105 of the Bankruptcy Code gives bankruptcy courts authority, in essence, to issue any writ or order "necessary or appropriate to carry out the provisions of this title." However, that section is not a "roving writ, much less a free hand." Jamo v. Katahdin Federal Credit Union (In re Jamo), 283 F.3d 392, 403 (1st Cir. 2002); *see also* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999) (court may not disregard the plain language of a statute and exercise discretion where none is afforded); *cf.* Norwest Bank Worthington v. Ahlers, 485 US 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1998) (not mentioning §105 but stating that whatever equitable powers the bankruptcy courts have can only be exercised within the confines of the Bankruptcy Code). In the present case, the Bankruptcy Appellate Panel for the First Circuit properly and soundly rejected the use of §105 in this context, Pet. at pg. 22, fn. 6, but nonetheless held that the "totality of the circumstances" can justify denial of the absolute right to convert. Marrama v. Citizens Bank of Massachusetts and DeGiacomo, Trustee, 313 B.R. at 533 (1st Cir. BAP 2004). The First Circuit was less forceful about rejecting the use of §105, but nonetheless did not rely on it, Pet. at 32.

prevent further abuse of the system. About four years later, in considering an appeal in the same case but on a different issue, the Tenth Circuit disclosed that the debtor had appealed the denial of conversion to the district court, and the district court had reversed in an unpublished decision. Calder v. Job et al, 973 F.2d 862 (10th Cir. 1992). While it may be *dicta*, the Tenth Circuit did agree with Calder "that the Bankruptcy Rules cannot override the absolute right to convert pursuant to §706(a)." Thus it seems clear that the bankruptcy court's decision in Calder is neither good precedent nor a proper foundation for the myriad of decisions that followed it. More recently, the Tenth Circuit Court of Appeals in In re Young, 237 F.3d 1168 (10th Cir. 2001), and the Bankruptcy Appellate Panel for the Tenth Circuit in Miller v. United States Trustee, et al, 303 B.R. 471 (10th Cir. BAP 2003), both confirmed that the law in that circuit is that the right to convert is absolute[17], thus joining the Fifth Circuit, *see* In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (5th Cir. 2005).

What constitutes "extreme circumstances" is not "capable of pragmatic and mechanical application."[18] The "extreme circumstances" standard leaves debtors and their counsel with no reliable guide as to how the law will be applied. Accordingly, bankruptcy courts should be required to follow the bright-line rule that Congress has established; conversion should only be denied if the debtor is not qualified for relief under the chapter to which conversion is

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[17] The Tenth Circuit stated that conversion could occur even after the discharge had entered, thus following the plain language of the statute which says that a debtor may convert "at any time".

[18] *See* Noll, note 15, *supra*.

sought, as defined in 11 USC §109, or if the case has already been converted once[19].

Failure to follow that bright-line rule, combined with other mis-readings of the statute, has caused much damage to debtors, and, by extension, to creditors, as well[20]. In one decision, In re Ponzini, 277 B.R. 399 (Bkrtcy.D.Ar. 2002), cited by the Bankruptcy Appellate Panel for the First Circuit in this case, Pet. at pg. 23, fn.7, the bankruptcy court initially correctly quoted the statute: "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, ..." but then proceeded to change the statute's language: "Moreover, and most importantly, §706(a) states that the court 'may' convert a case at any time." (emphasis added.) Id. at 404. Section 706(a) does not say any such thing; it says that the debtor may convert a case at any time. Thus the statute gives the debtor discretion, not the court. *See* In re Barbieri, 199 F.3d 616 (2nd Cir. 1999) (court may not disregard the plain language of a statute and exercise discretion where none is afforded). This flawed reading of the statute unfortunately was persuasive in the present case to the Bankruptcy Appellate Panel for the First Circuit. In denying Marrama's motion for rehearing on that and other points, the Panel held, in essence, that the distinction is irrelevant. Marrama respectfully disagrees; the distinction is important because it is a distinction made by Congress in its choice of language.

More recently, the Bankruptcy Appellate Panel for the Sixth Circuit recited a litany of alleged sins by a debtor, and

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[19] If the case has already been converted once but the debtor qualifies for relief under the chapter to which conversion is sought, conversion becomes discretionary with the bankruptcy court.

[20] In order to be confirmed, a chapter 13 plan must propose to pay creditors at least as much as they would receive in a chapter 7 liquidation. Thus, courts which deny conversion deny creditors the opportunity to receive *more* than they otherwise would have received.

noted that the bankruptcy court had found that the desire to convert to chapter 13 was "motivated solely by a desire to avoid a determination that the Debtor was not entitled to a discharge (or that his obligations to Ms. Copper are nondischargeable) and not by a desire to repay his creditors, and that the motion thus represented an improper attempt to 'manipulate the Bankruptcy Code.'" In re Copper, 314 B.R. 628 (6th Cir. BAP 2004). Given that the ultimate goal of *all* individual debtors is to obtain a discharge[21], Marrama fails to see anything wrong with "a desire to avoid a determination that the Debtor was not entitled to a discharge" under chapter 7, or that certain obligations are nondischargeable, especially since it is Congress that stated that some debts that may not be discharged in chapter 7 nonetheless *can* be discharged in chapter 13. Furthermore, to the extent that there is improper manipulation of the Bankruptcy Code, it can be remedied without denying the debtor a right granted by Congress[22].

V. THE POLICY UNDERLYING THE RIGHT TO CONVERT.

In reaching its conclusion, the First Circuit Court of Appeals analyzed the statute and concluded that although the statute was not ambiguous, the court nonetheless "would look to the statute's 'historical context, its legislative history, and the underlying policies that animate its provisions.'"

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[21] Corporate debtors are not entitled to a discharge in chapter 7. *See* 11 USC §727(a)(1).

[22] *See, e.g.*, In re Croston, 313 B.R. 447 (9th Cir. BAP 2004) ("We are not persuaded by decisions that deny §706(a) motions in order to foil perceived dysfunction," *citing as non-persuasive, inter alia* Kuntz v. Shamban (In re Kuntz), 233 B.R. 580 (1st Cir. BAP 1999). *Cf.* Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) (remedy for a debtor claiming an exemption to which he is not entitled is not denial of the exemption where the objection to the exemption was untimely, as there are remedies that do not require violating the plain language of the rule).

Marrama v. Citizens Bank of Massaachusetts and DeGiacomo, Trustee, 430 F.3d at 4; *Pet. at pg. 36*. The court then quoted from the Legislative History:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individuai repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

citing H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. The court then observed that

> It is the pronounced policy of subsection 706(a) "that the debtor should always be given the opportunity to repay his debts," H.R.Rep. No. 95-595, at 380, thus should be given one chance to effectuate a viable chapter 13 plan. It is plainly implicit in this legislative observation, however, that such an opportunity is to be accorded only to *honest* debtors.

The implication is not so plain to Marrama, or to those courts that find the right absolute, as it is to the First Circuit. The persistent reference to "honest" debtors, especially in cases which deny that the right is absolute, no doubt take their cue from this court's oft-repeated statement in Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 35 S.Ct. 289, 59 L.Ed. 713 (1915), *cited in* Local Loan Co. v. Hunt, 292 US 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) *and other cases too numerous to list*, that bankruptcy relief is intended to afford the "honest but unfortunate debtor" a fresh start on her financial life.

It is perhaps too easy for bankruptcy courts to take the word "honest" in that quotation and mis-apply it to justify whatever result seems appropriate. Literal application would cause plainly absurd results because, for example, it is Congress that decides what type of debts may be discharged. *See, e.g.,* 11 USC §727 *and* 11 USC §1328. Under chapter 13, even actual fraud may be discharged[23]. A debtor that committed actual fraud prior to filing a bankruptcy petition does not fit within the conventional understanding of "honest". Thus bankruptcy courts are abusing their discretion when they refuse to permit conversion from chapter 7 to chapter 13 based on the fact that the debtor is seeking a remedy in chapter 13 that would not be available in chapter 7; it is not bad faith to seek a remedy that the law allows. *See* In re Croston, 313 B.R. 447 (9th Cir. BAP 2004), *citing* Street v. Lawson (In re Street), 55 B.R. 763 (9th Cir. BAP 1985) ("neither conduct nor motive vitiates the absolute nature of the right to convert;" conversion after a judgment of non-dischargeability is not "manipulation of the Bankruptcy Code").

Nonetheless, the First Circuit felt that the Congressional policy as stated in the Legislative History could be overridden:

> A legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an

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[23] The discharge under chapter 13 frequently has been referred to as a "super-discharge" since a broader range of debts could be discharged in chapter 13. The 2005 amendments to the Bankruptcy Code eliminated many, but not all, of the differences in discharges between the chapters, but these amendments are not applicable in this case.

> ongoing scheme to retain his non-exempt assets from bona fide creditors.

430 F.3d at 481; *Pet. at pg. 39.* It appears to be the alleged "scheme" that concerned the First Circuit, as a few paragraphs later, the court observed that "the instant conversion ... would divest the chapter 7 trustee of any authority to act in behalf of the estate to safeguard its assets. *See* Bankruptcy Code § 348(e), 11 U.S.C. § 348(e). Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in 'property of the estate,' *as well as the concealed property.*" (Emphasis in the original.)

Leaving aside the fact that there is absolutely no proof in the record whatsoever that Marrama *concealed* any property and that concealment was not the true issue before the bankruptcy court[24], the result which the First Circuit found so unpalatable is precisely the result which Congress dictates. 11 USC §348(e) states that "conversion ... terminates the service of a trustee or examiner that is serving in the case before such conversion." If Congress wanted the same trustee to continue to serve as trustee, it would have said so. Similarly, if Congress wanted chapter 13 trustees to have exactly the same powers as chapter 7 trustees, it would have said so. *Compare, e.g.,* 11 USC §704 *with* 11 USC §1302. The reference to reacquiring "his interest in 'property of the estate'" is also meaningless since that is precisely the result Congress intended; 11 USC §1327(b) provides that property of the estate revests in the debtor except as set forth in the plan or the order confirming the plan[25]. Furthermore,

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[24] That being the omission of the transfer from the Statement of Financial Affairs, which was a mere scrivener's error. Somehow this issue transmogrified into concealment, which is clear error.

[25] There is a debate about what it means for property to "vest in the debtor", at least in the First Circuit. *See* Barbosa v. Soloman, 235 F.3d 31

since an explicit requirement for confirmation is that general unsecured creditors receive *at least* as much in chapter 13 as they would in chapter 7 (and usually more), there is no harm to creditors in a chapter 13 plan being confirmed; ideally, they benefit, especially if the case would otherwise result in no payments to creditors. *See* 11 USC §1325(a)(4).

None of the First Circuit's allegedly policy-based reasons for disregarding the plain language of the statute and the Legislative History have any basis in law. Ultimately, there is nothing wrong with wanting to convert to chapter 13 in order to retain an asset, as that is exactly what Congress has permitted in chapter 13[26]. Congress plainly stated that the policy of 11 USC §706 is that a debtor should always be given the opportunity to repay his debts and, by extension, to retain his non-exempt assets. Denying debtors that opportunity for subjective reasons, or to punish the debtor, plainly offends Congressional purpose; finding that the right to convert is absolute puts that policy into effect.

VI. A DEBTOR'S DUE PROCESS RIGHTS AND CONVERSION

In justifying its conclusion that the right to convert is not absolute, the First Circuit noted, correctly, that pursuant to 11 USC §1307, the bankruptcy court has discretion to

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(1st Cir. 2000) (affirming the district court's holding that vesting in the debtor does not mean that such property is no longer property of the estate). In that case, the bankruptcy court held that vesting means, essentially, that the property is removed from the estate, a position that would lend some support to the First Circuit's concern in this case. However, the district court held that position to be an error of law and the First Circuit affirmed the district court. Thus the First Circuit's concern here is contradictory to its prior holding in Barbosa.

[26] *Cf.* In re Miller, 113 B,R, 98 (Bkrtcy.D.Mass. 1990) (In Massachusetts, declaring a homestead exemption is not a fraudulent transfer because it is not a "transfer" at all and is expressly permitted by statute; it is not "bad faith" to do what the law allows.)

reconvert or dismiss a chapter 13 case "for cause". Pet. at pg. 39. The circuit court saw no reason to require the "technical formality" that the case actually be converted to chapter 13 before considering allegations of bad faith, and that "cause" includes a failure to propose a plan in "good faith" as required by 11 USC §1325(a)(3). Pet. at pg. 39. In Marrama's view, that requirement is engrained in the statute and the bankruptcy rules, and short-circuiting the statutory procedure violates a debtor's due process rights.

The elements of due process were firmly established by this court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Due process requires notice and an opportunity to be heard, Id., and has both procedural and substantive aspects. *See* In re Melendez-Colon, 265 B.R. 639 (1st Cir. BAP 2001). It is a violation of due process for a bankruptcy court to decide issues not presented or to make factual determinations where no evidence was presented[27]. Id; In re Muessel, 292 B.R. 712 (1st Cir. BAP 2003). When seeking conversion from chapter 7 to chapter 13, there is no requirement that a chapter 13 plan be filed before conversion can be allowed. In fact, Fed.R.Bankr.P. 3015(b) provides that when a case is converted, the debtor has fifteen days to file a plan; in other words, the obligation to file a plan does not arise until the case actually is converted. The time can be extended, but can not be reduced. Fed.R.Bankr.P. 9006(c)(2). *Cf.* Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) (holding that an objection to a claim of exemption, or a request for an extension of time to object, must be filed within the time allowed and pursuant to

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[27] Such as the determination by the BAP in this case that Marrama had improperly claimed a homestead exemption. While the BAP had this case under advisement, the bankruptcy court, itself, determined that the homestead exemption was properly claimed. In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004).

Fed.R.Bankr.P. 9006, the time cannot be enlarged; good faith in claiming the exemption is not relevant[28]). Thus, determinations of good faith based solely on a request for conversion lack any evidentiary support, especially where, as here, no plan was filed, and violate due process because good faith is not a condition to conversion.

The procedure apparently followed by the bankruptcy court in In re Cabral, 285 B.R. 563 (1st Cir. BAP 2002), would seem to be the correct procedure. According to the BAP, the bankruptcy court converted that case to chapter 13 "as of right" when the request was made, and thereafter treated the chapter 7 trustee's objection to conversion as a motion to reconvert. The bankruptcy court held a non-evidentiary hearing and concluded that the plan was not filed in good faith as required by 11 USC §1325 and was otherwise unconfirmable, and converted the case back to chapter 7. It is clear that the bankruptcy court was conducting the appropriate analysis under chapter 13, with evidence properly before her, and not good faith in requesting the conversion. Due process was observed.

It is also clear that in that case, a chapter 13 plan had been filed, even though the Rule does not require it until after conversion. In the present case, no plan had been filed, so the bankruptcy court had no evidence before it from which it could make findings concerning Marrama's good faith in filing a plan or the confirmability of the plan[29]. Although a non-evidentiary hearing was held, the only "evidence" presented to the bankruptcy court was the representations of

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[28] In the same way, good faith is not an issue on a motion to avoid a creditor's non-consensual judicial lien; the statute only requires the court to conduct an arithmetic test and the court cannot use its discretion in applying the statute. In re Snyder, 279 B.R. 1 (1st Cir. BAP 2002).

[29] For the same reason, the Chapter 13 Trustee's remarks at the hearing in the bankruptcy court, JA pg. 34a, were utterly meritless, especially as the Chapter 13 Trustee had no standing to be heard at the time.

counsel, which are not evidence at all. Both the BAP and the First Circuit, however, held that this procedure was appropriate because no evidentiary hearing had been requested. Since it is a fundamental requirement that summary judgment be denied when material facts are in dispute, *see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), it is error to require that an evidentiary hearing be *requested* when there is no evidence properly before the court which would justify summary judgment; it is incumbent on the court to recognize the factual dispute and set the matter for trial.

This means that the procedure required by the Rules reinforces the view that the right to convert is absolute. If a request for conversion could be denied based upon the provisions of a proposed plan or for other reasons, the Rule would require that a plan be filed with the request so that the bankruptcy court could have the plan before it. That is not what the Rule says, however; it says that the plan must be filed within 15 days *after* conversion. Similarly, nothing in Fed.R.Bankr.P. 1017(f)(2) permits a bankruptcy court to take evidence when considering a motion to convert a chapter 7 case, except regarding the two conditions in the statute. In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995). If the right were not absolute, conversion would be defined by the Rules as a contested matter, subject to Fed.R.Bankr.P. 9014. Id.

Nothing in the Bankruptcy Code or rules permits bankruptcy courts to impose their own subjective requirements for conversion of a case from chapter 7 to another chapter or to consider evidence on any question other than the explicit statutory restrictions on conversion. Doing so violates the due process rights of debtors because it imposes requirements and restrictions not contemplated by Congress. Procedural due process requires that when a statute or rule establishes the procedure to be followed, that procedure must be followed.

CONCLUSION

The plain language of 11 USC §706 states that a debtor may convert a chapter 7 case to another chapter, so long as the debtor is qualified to be a debtor in the chapter to which conversion is sought and the case has not been previously converted. In those circumstances, the statute gives the debtor discretion to convert. Nothing in the statute, however, gives the bankruptcy court discretion to deny the absolute right for subjective reasons not found in the statute. Courts which add other requirements or restrictions, or seek to punish a debtor because of perceived abuses, err because they violate the Congressional policy clearly set forth in the Legislative History, which unambiguously states that the one-time right of conversion is absolute.

For all of the foregoing reasons, the petitioner requests that the First Circuit Court of Appeals be reversed, and that this case be remanded to the bankruptcy court for the District of Massachusetts for further proceedings consistent with this Court's opinion.

Dated: August 2, 2006

Respectfully submitted,
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IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS, and
MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT CITIZENS BANK OF MASSACHUSETTS

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QUESTION PRESENTED

Does a bankruptcy court have authority to deny, on grounds of bad faith or to prevent abuse of the bankruptcy system, a debtor's request made under section 706(a) of the Bankruptcy Code, 11 U.S.C. § 706(a), to convert a chapter 7 bankruptcy case to a proceeding under chapter 13.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Respondent Citizens Bank of Massachusetts is owned by its directors (.01%) and by Citizens Financial Group, Inc. (99.99%). Citizens Financial Group Inc. is a wholly-owned subsidiary of RBSG International Holdings Limited. RBSG International Holdings Limited is a wholly-owned subsidiary of The Royal Bank of Scotland plc. The Royal Bank of Scotland plc is a wholly-owned subsidiary of The Royal Bank of Scotland Group plc, which is a publicly traded company. There is no parent or publicly held company owning 10% or more of the stock of The Royal Bank of Scotland Group plc.

Respondent Mark G. DeGiacomo, is an individual serving as the court-appointed trustee of the chapter 7 bankruptcy estate of petitioner Robert Lewis Marrama, who is an individual.

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PRELIMINARY STATEMENT

This matter arises out of the chapter 7 bankruptcy case of Petitioner Robert Louis Marrama ("Marrama"). Respondent Citizens Bank of Massachusetts ("Citizens Bank") is Marrama's largest creditor. Respondent Mark DeGiacomo ("Trustee") is the chapter 7 trustee of Marrama's bankruptcy estate.

Several months before Marrama commenced his voluntary bankruptcy case under chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.*, he refinanced real estate that he owned in Maine and transferred most of the proceeds of the refinancing to an account in the name of his girlfriend. He then transferred the real estate itself to a trust for his benefit and installed his girlfriend as trustee. After Marrama commenced his bankruptcy case, he failed to disclose these transactions (as well as his entitlement to a sizeable tax refund), and listed the real property in the trust as worthless (when in fact it had substantial value). When the Trustee questioned the transactions and indicated that he would recover the real estate for the benefit of creditors, Marrama responded by attempting to convert his chapter 7 case to a proceeding under chapter 13 to avoid the Trustee (who would be displaced automatically if the case were converted to chapter 13, *see* 11 U.S.C. § 348(e)). The bankruptcy court denied Marrama's attempt to convert on the ground that Marrama had acted in bad faith and to prevent abuse of the bankruptcy system.

Section 706 of the Bankruptcy Code provides that a debtor "may" convert his or her case from a proceeding under chapter 7 to one under chapter 13. 11 U.S.C. § 706. Marrama contends that, despite any bad faith on his part, he had the absolute right to convert his case and that the bankruptcy court lacked the authority to deny the conversion. Section 706, however, does not confer the absolute right that Marrama claims, nor does it otherwise abrogate a bankruptcy court's longstanding authority to deny relief for bad-faith conduct or to prevent abuse, and the bankruptcy court properly exercised its discretion in denying conversion in this instance. On appeal, the First Circuit properly affirmed the bankruptcy court, and this Court should likewise affirm.

STATEMENT

A. Events Preceding Marrama's Chapter 7 Case

Prior to commencing his chapter 7 case, Marrama owned and operated a business known as RLM Flooring ("RLM"). JA 20a, 37a.[1] Citizens Bank loaned funds to RLM, and Marrama guaranteed RLM's debt to the bank. *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 445 F.3d 518, 520 (1st Cir. 2006).[2] By June of 2002, RLM had defaulted on its obligations to the bank, and the bank demanded repayment of approximately $255,000 in outstanding indebtedness. *Id.*, *see also Marrama III*, 331 B.R. at 12 (noting demand). Two weeks later, on July 10, 2002, the bank commenced a state court action to recover the debt (the "State Court Action"). *See Marrama IV*, 445 F.3d at 520; *Marrama III*, 331 B.R. at 12.

During this same period, Marrama refinanced a vacation home that he owned in York, Maine (the "Maine Property"), and obtained approximately $118,000 in cash as a result of the refinancing. *Marrama IV*, 445 F.3d at 520; *see* JA 23a, 56a-58a, 61a. Marrama initially deposited the proceeds of the refinancing transaction into an account held jointly with his girlfriend, Josephine Bolletiero ("Bolletiero"). *Marrama IV*, 445 B.R. at 520;

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[1] "JA" refers to the Joint Appendix. "SJA" refers to the Supplemental Joint Appendix.

[2] Reported decisions in Marrama's bankruptcy cases (other than the decisions of the Bankruptcy Appellate Panel and First Circuit contained in the Petition Appendix), and the manner in which they are referred to in this brief, are as follows: *In re Marrama*, 307 B.R. 332 (Bankr. D. Mass. 2004) ("*Marrama I*"); *Marrama v. DeGiacomo (In re Marrama)*, 316 B.R. 418 (1st. Cir. BAP 2004) ("*Marrama II*"); *Citizens Bank of Mass. v. Marrama (In re Marrama)*, 331 B.R. 10 (D. Mass. 2005) ("*Marrama III*"); *Marrama v. Citizens Bank of Mass. (In re Marrama)*, 445 F.3d 518 (1st Cir. 2006) ("*Marrama IV*"); *In re Marrama*, 345 B.R. 458 (D. Mass. 2006) ("*Marrama V*").

Marrama III, 331 B.R. at 13 (noting transfer).[3] After using approximately $9,000 to pay some debts owed to creditors other than Citizens Bank, Marrama transferred the remaining amount of the funds - approximately $109,000.00 - into an account held in Bolletiero's name alone. *Marrama IV*, 445 F.3d at 520; *Marrama III*, 331 B.R. at 13. Marrama later testified "that he did this because [Bolletiero] asked him to and because there was 'no reason to have two accounts.'" *Marrama III*, 331 B.R. at 13 (citation omitted).

On August 9, 2002 - shortly after Citizens Bank commenced the State Court Action - Marrama created a revocable trust for his benefit known as the "Bo-Mar Realty Trust" (the "Trust"). JA 84a. Marrama hired an attorney to create the Trust. JA 52-53a. One week later, on August 16, 2002, the judge presiding over the State Court Action "enjoined Marrama from disposing of any assets except for normal living expenses and granted Citizens [Bank] authority to seize and liquidate all of [RLM's] assets." *Marrama III*, 331 B.R. at 12 (footnote omitted); *see also Marrama IV*, 445 F.3d at 520 (noting entry of order against Marrama). In spite of this injunction, "[i]n late August 2002 - after the [state] court ordered him not to transfer any assets - Marrama used the [Maine] Property to fund 'the [Trust.]'" *Marrama IV*, 445 F.3d at 520; *Marrama III*, 331 B.R. at 13 (noting transfer of Maine Property to the Trust). Marrama received no consideration in exchange for his transfer of the Maine Property to the Trust, or his cash transfer to Bolletiero, and he designated himself the sole beneficiary of the Trust with Bolletiero as the sole trustee. JA 52a, 74a-75a. Marrama later testified that he placed the Maine Property into the Trust "to try to protect it" from creditors. JA 75a; *Marrama IV*, 445 F.3d at 520; *Marrama III*, 331 B.R. at 13.

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[3] The details of this transfer to Bolletiero were set forth in *Marrama III*, 331 B.R. at 13, which the court of appeals cited in its decision below. Pet. App. 44 (citing *Citizens Bank of Mass. v. Marrama*, 2005 WL 1106919, at *5 (D. Mass. May 9, 2005), subsequently officially reported at *Marrama III*, 331 B.R. 10 (D. Mass. 2005)).

B. Marrama's Chapter 7 Filing

Approximately seven months later, on March 11, 2003, Marrama sought protection under chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.*, by filing a voluntary chapter 7 petition with the bankruptcy court. SJA 1. By operation of law, when Marrama commenced his bankruptcy case, a bankruptcy estate was created consisting of all of his property wherever located. 11 U.S.C. § 541. In addition, immediately following the commencement of Marrama's chapter 7 case, the office of the United States Trustee - a division of the Department of Justice with oversight authority in bankruptcy cases - appointed the Trustee to serve in Marrama's case and to take possession of and preside over Marrama's bankruptcy estate. 11 U.S.C. § 701(a)(1) (providing for the appointment of a trustee in every chapter 7 case); *see also* 11 U.S.C. § 702 (providing for the election by creditors of a trustee to serve in a chapter 7 case). The duties of a chapter 7 trustee include "collect[ing] and reduc[ing] to money the property of the estate" and "investigat[ing] the financial affairs of the debtor." 11 U.S.C. § 702.

In addition to prescribing the trustee's duties, the Bankruptcy Code vests a bankruptcy trustee with certain powers, including the authority to avoid various transfers that the debtor made prior to filing his or her bankruptcy petition. 11 U.S.C. § 548 (providing for the avoidance of fraudulent transfers made within one year before bankruptcy); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994) (discussing recovery of fraudulent transfers under section 548); *see also* 11 U.S.C. § 544 (trustee's avoidance powers); *Sears Petroleum & Transp. Corp. v. Burgess Constr. Svcs., Inc.*, 417 F. Supp. 2d 212, 220 (D. Mass. 2006) (discussing application of Massachusetts Uniform Fraudulent Transfer Act under section 544). In addition, section 550 of the Bankruptcy

Code permits a trustee to recover transferred property for the benefit of the estate. 11 U.S.C. § 550(a).[4]

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate, and a creditor holding a pre-petition claim is entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(5), 101(10), 501(a), 502(b); Fed. Bankr. Rule P. 3001, 3002; *see Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("bankruptcy . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*").[5] After the trustee reduces property of the estate to money, he or she then distributes the funds to creditors on account of their filed claims as the Bankruptcy Code directs. 11 U.S.C. § 726.

Central to the administration of a chapter 7 case is the debtor's timely and candid disclosure of assets and financial dealings. 11 U.S.C. § 521 (requiring disclosures); Fed. R. Bankr. P. 1007 (same). Congress has determined that this disclosure is so important that a debtor who fails to comply risks losing his or her bankruptcy discharge. 11 U.S.C. § 727(a) (providing that the court may deny a discharge to a debtor who has concealed transfers of

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[4] Other sections of the Bankruptcy Code provide further assistance in the collection of property. Section 551 of the Code automatically preserves for the benefit of the estate any transfer that the trustee avoids. 11 U.S.C. § 551 ("Any transfer avoided under section . . . 544 . . . [or] 548 . . . is preserved for the benefit of the estate."). Pursuant to section 542, the recipient of property that may be administered as part of the estate also is obligated to return the property to the estate. 11 U.S.C. § 542(a) ("an entity . . . in possession, custody, or control . . . of property that the trustee may use . . . shall deliver to the trustee . . . such property").

[5] The Bankruptcy Code defines "creditor" as a person holding a claim that arises before the debtor commences a bankruptcy case. 11 U.S.C. § 101(10). The term "pre-petition" refers to claims or events arising or occurring *before* the debtor files a bankruptcy petition. Conversely, the term "post-petition" refers to claims of events arising or occurring *after* the debtor files.

property, or has concealed information regarding the debtor's transactions or financial affairs). To facilitate and standardize disclosures, the Bankruptcy Code and Rules require that debtors supply certain mandatory information on prescribed schedules and statements, including information regarding the debtor's ownership interests in property and transfers made by the debtor prior to filing for bankruptcy. *See* Official Form 6 (schedules); Official Form 7 (Statement of Financial Affairs).

On schedule A to his chapter 7 petition, Marrama declared that he owned and resided in a home in Gloucester, Massachusetts (the "Massachusetts Property"). SJA 4. On schedule C, Marrama claimed a homestead exemption for the Massachusetts Property. SJA 7, 18, 21; Pet. App. 10-11. Marrama, however, did not list or identify the Maine Property on schedule A. Rather, on schedule B, Marrama indicated that he was the beneficiary of the Trust, but listed the value of the Trust *res* as zero. SJA 6. In fact, the Trust *res* - the Maine Property - had considerable value, which Marrama would later estimate to be approximately $220,000, JA 59a, and which would later be sold for an even higher amount.

In Marrama's Statement of Financial Affairs filed with his bankruptcy petition, Marrama stated (in response to question 10) that he had not made any transfers of property "other than . . . in the ordinary course of [] business or financial affairs" within one year preceding the filing of the chapter 7 petition. SJA 23. Marrama failed to disclose either the transfer of the Maine Property to the Trust, or the transfer of approximately $109,000 to Bolletiero. *Marrama IV*, 445 F.3d at 520. Separately, Marrama stated that the IRS did not owe him any tax refunds.[6] SJA 6. In fact, Marrama was entitled to a significant refund, which the Trustee later collected. *Marrama III*, 331 B.R. at 13; *see* JA 31a.

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[6] Item 17 on schedule B directs the debtor to "identify other liquidated debts owing debtor including tax refunds." Marrama's response to Item 17 was "none." SJA 6.

In addition to requiring certain disclosures, the Bankruptcy Code and Rules provide creditors an opportunity to meet with the debtor early in the case to conduct a limited examination of the debtor under oath (a "Section 341 Meeting"). 11 U.S.C. § 341; Fed. R. Bankr. P. 2003. Marrama's Section 341 Meeting was adjourned several times, but was eventually held on April 24, 2003. *See* JA 36a; Pet. App. 11.[7] During the course of the meeting, it became clear that certain of Marrama's representations in his chapter 7 petition, schedules, and Statement of Financial Affairs were materially incomplete and inaccurate. For example, when asked if he owned any real estate other than the Massachusetts Property, JA 40a; *see also* SJA 4, Marrama responded: "I have a piece of property in Maine." JA 40a. His attorney then corrected him, explaining, "[t]hat's actually owned by [the] trust, right?" *Id.* Marrama responded: "Right. That's owned by [the] trust." *Id.*

During his testimony, Marrama admitted to refinancing the Maine Property with a loan from Bank One, N.A. ("Bank One") in the amount of $135,000. JA 56a-57a; SJA 9.[8] Marrama further

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[7] Separately, the bankruptcy court required that Marrama appear for an examination to be conducted by Citizens Bank pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. *See Marrama III*, 331 B.R. at 14. Marrama failed to appear at scheduled Rule 2004 examinations on May 13, 2003 and September 10, 2003. *Id.* He did appear for an examination on September 29, 2003, but did not produce the documents requested by Citizens Bank. *Id.* Moreover, while he answered questions posed by the Trustee on September 29, 2003, Marrama refused to answer questions posed by Citizens Bank, invoking his Fifth Amendment right against self-incrimination. *Id.*; *see also id.* at n.4.

[8] Marrama testified that he purchased the Maine Property for $40,000.00 in 1998. JA 54a-55a. He explained that he paid for the Maine Property by transferring $4,000.00 in cash to the seller and executing a $36,000.00 promissory note in the seller's favor. JA 55a. Marrama used a portion of the proceeds from the refinancing with Bank One to pay off the balance due on the seller's note and, as noted, deposited approximately $109,000

admitted that he transferred the Maine Property to the Trust for no consideration. JA 74a-75a. He also admitted that he designated Bolletiero as the trustee of the Trust, and that he is the sole beneficiary of the Trust. JA 52a. Finally, Marrama admitted that he transferred the Maine Property to the Trust seven months prior to commencing his chapter 7 bankruptcy case to "try to protect it" from his creditors. JA 75a; *see also Marrama IV*, 445 F.3d at 523.

Although Marrama listed the value of the Maine Property as zero in his schedules, SJA 6, during the Section 341 Meeting Marrama estimated the value of the property to be approximately $220,000.00 and explained that the Bank One mortgage - the only encumbrance on the Maine Property - secured an outstanding balance of no more than $135,000.00. JA 56a, 59a. Subsequently, after recovering the Maine Property for the benefit of creditors, the Trustee sold it on July 21, 2004 at auction for $258,000.00.

In addition, Marrama admitted during the Section 341 Meeting that he had actually been living in the Maine Property (rather than the Massachusetts Property claimed as his homestead) for two months. JA 71a; *see also Marrama I*, 307 B.R. at 335 (noting testimony). He also admitted that he was renting the Massachusetts Property to two tenants, and was deriving $2,150 in income as a result. JA 71a, 72a; SJA 21. Yet, on schedule I he declared that he received no income generated by sources other than his employment. SJA 7, 18, 21; Pet. App. 10-11.[9] Marrama did not amend his schedules to reflect this additional income until August 11, 2003 - well after the Trustee had voiced his concern over Marrama's less than candid disclosures. *See* SJA 30-31; Pet. App. 13.

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of the proceeds in August of 2002 into an account held by Bollettiero. *Marrama IV*, 445 F.3d at 520; *Marrama III*, 331 B.R. at 13.

[9] Marrama stated on schedule I that he generated monthly income of $5,762 (on a salary of $8,600) and had monthly expenses of $4,925.95. SJA 18; Pet. App. 11.

C. Marrama's Motion To Convert To Chapter 13

Following the Section 341 Meeting, the Trustee advised Marrama that he intended to recover the Maine Property for the benefit of the bankruptcy estate and Marrama's creditors. JA 15a. In response, Marrama filed a Verified Notice Of Conversion To Chapter 13 (the "Motion to Convert") in the bankruptcy court, seeking under section 706(a) of the Bankruptcy Code to convert his chapter 7 case to a proceeding under chapter 13. JA 11a. The Motion to Convert was a one paragraph document in which Marrama stated "that the case has not been converted from another chapter previously, and that [he was] qualified to be a debtor under Chapter 13." JA 11a.

Proceedings in chapter 13 differ materially from those under chapter 7. In chapter 7, the debtor surrenders his or her nonexempt assets to the trustee who liquidates the assets for the benefit of creditors. 11 U.S.C. § 704(a)(1); *see also* 11 U.S.C. § 522 (governing exemptions). In exchange, the debtor typically receives a discharge of most prior indebtedness. 11 U.S.C. § 727; *see also* 11 U.S.C. §§ 523 (prescribing exceptions to discharge), 524 (prescribing effect of a bankruptcy discharge). In contrast, in chapter 13 the debtor typically retains his or her property, and receives a discharge only after completing (or substantially completing) payments to creditors in accordance with a confirmed chapter 13 repayment plan. 11 U.S.C. §§ 1322 (providing for contents of chapter 13 repayment plan), 1327(b) (providing for vesting of property of the estate in the debtor upon confirmation of the debtor's chapter 13 plan), 1328 (providing for discharge after completion, or substantial completion, of payments under the plan). Whereas any individual may commence a chapter 7 case, *see* 11 U.S.C. § 109(b), only an individual with regular income and debts below certain levels may be a debtor under chapter 13, *see* 11 U.S.C. § 109(e). Critically, when a case is converted from chapter 7 to chapter 13, the services of the chapter 7 trustee are terminated. 11 U.S.C. § 348(e). Although a standing chapter 13 trustee presides generally over chapter 13 cases, the duties of the chapter 13 trustee do not include collecting and reducing the debtor's

property to money for the benefit of creditors. 11 U.S.C. § 1302(b).

Bankruptcy Rule 1017(f)(2) requires that a request for conversion under section 706(a) must be made by motion served on all parties in interest as required by Bankruptcy Rules 9013 and 2002(a)(4). Fed. R. Bankr. P. 1017(f)(2), 2002(a)(4). This procedure affords creditors and the chapter 7 trustee the opportunity to object to the conversion. Here, the Trustee opposed Marrama's conversion to chapter 13 on the ground that Marrama had intentionally failed to disclose the transfer of the Maine Property to the Trust some seven months prior to filing his chapter 7 petition, and that Marrama had sought conversion to frustrate the Trustee's efforts to recover assets for the benefit of creditors. JA 13a-18a, 29a-31a; *see also* JA 61a ("I want to know [] how this gentleman spent $100,000 dollars since last spring, approximately."). Citizens Bank also opposed the conversion. JA 19a-27a, 31a-32a.

Shortly after the Trustee and the bank filed their oppositions to the motion, but before the hearing on the motion, the IRS advised the Trustee that, prior to filing for bankruptcy, Marrama had claimed a tax refund of $11,194.00 in an amended tax return filed in July 2002. JA 30a-31a. As noted, Marrama did not disclose his entitlement to a tax refund in his schedules. SJA 6. Subsequently, on September 5, 2003, the Trustee learned that Marrama was entitled to a tax refund from the IRS in the amount of $8,745.86. *Marrama III*, 331 B.R. at 13; *see* JA 31a.

D. The Bankruptcy Court's Denial Of Conversion

On August 27, 2003, the bankruptcy court held a hearing on the Motion to Convert. JA 28a. Prior to the hearing, Marrama contended in response to the Trustee's and the bank's oppositions to his motion that his various misstatements and omissions were inadvertent. JA 33a.[10] Marrama's attorney claimed that the failure

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[10] Responding to the Trustee's objection, Marrama also indicated that he was "Treating the objection as a motion to reconsider conversion, *see In*

to disclose the transfer of the Maine Property to the Trust was a drafting error on his part. JA 33a. With respect to the tax refund, he claimed that "we found out about that the same time the Trustee did." *Id.* Yet, as noted, Marrama had actually filed the amended tax return seeking the refund in July of 2002 - some eight months *before* commencing his chapter 7 case. *Marrama III*, 331 B.R. at 13.

At the hearing on the motion, Marrama argued that "the only reason he filed a Chapter 7 instead of a 13, [] was because he was unemployed and unqualified for Chapter 13" on the petition date. JA 33a; *see also* Pet. at 3 Yet, in schedule I to his petition, Marrama affirmatively represented that he was in fact employed on the petition date, earning a monthly salary of $8,600. SJA 18; JA 64a (on April 24, 2003, Marrama also testified that he was employed); *see also Marrama V*, 345 B.R. at 462 n.5 (noting Marrama's claim of unemployment is flatly contradicted by Marrama's own sworn statements). At the hearing, the standing chapter 13 trustee for the Eastern District of Massachusetts appeared and stated that, on the facts presented, Marrama would not be able to confirm a chapter 13 plan. JA 28a-35a; *see also* 11 U.S.C. § 1325(a)(7) (as amended in 2005, requiring that, in order to confirm a chapter 13 plan, the debtor's filing of the bankruptcy petition was in good faith). Marrama's failure to disclose his tax refund was also addressed. JA 31a.

Following argument, the bankruptcy court denied conversion based on Marrama's bad faith. JA 35a, SJA 33. The court stated: "I don't think there's an 'Oops' defense to the concealment of assets." JA 34a. The court emphasized the debtor's disclosure

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re Cabral, 285 B.R. 563 (1st Cir. BAP 2002)" - in other words, he was treating the Trustee's objection as though conversion had been granted and the court were considering whether to reconvert the case back to chapter 7. JA 2a; Case No. 03-11987 (Bankruptcy Court, District of Mass.), Docket Entry No. 73 (Aug. 11, 2003) (Debtor's Response To Chapter 7 Trustee's Objection To Conversion To Chapter 13) (hereinafter, the "Reply on Conversion").

obligations in bankruptcy, stating: "I believe that there is an obligation on the part of people who file schedules in bankruptcy cases to get it right." *Id.* The court also noted Marrama's undisclosed pre-petition transfers of property, stating: "certainly in my mind there is a major presumption of bad faith when you have a grantor trust within a year of bankruptcy and the property is not disclosed." *Id.*

E. The Bankruptcy Appellate Panel's Affirmance

Marrama appealed to the bankruptcy appellate panel for the First Circuit (the "BAP"), which affirmed. Pet. App. 10. The BAP determined that a debtor's request for conversion under section 706(a) could be denied where "extreme circumstances" exist. Pet. App. 22. The court explained:

> [t]he extreme circumstances approach requires the bankruptcy court to make a factual determination as to the existence of extreme circumstances, such as bad faith, abuse of process, or other gross inequity, and such cases typically involve egregious conduct on the part of the debtor, who is seeking to use the bankruptcy process abusively and selfishly rather than for its intended purpose.

Pet. App. 19 (citations omitted); *see also id.* at 22 (finding presumption in favor of conversion). The BAP also explained that "a bankruptcy court may use the totality of the circumstances approach to determine whether the same are extreme and warrant denial of a Chapter 7 debtor's motion to convert to Chapter 13 under [section] 706(a)." Pet. App. 22.

Turning to the facts, the BAP found that the bankruptcy court's denial of conversion was warranted in light of Marrama's bad faith. Pet. App. 23-28. The BAP found that Marrama's failure to disclose the transfer of the Maine Property was consistent with his stated intent of protecting it from creditors, rather than being a mistake. Pet. App. 25-26. The BAP also noted that Marrama did not seek to amend his schedules or statements to cure material

misstatements and omissions until *after* the bankruptcy court had denied conversion. Pet. App. 26.[11]

The court noted that Marrama did not disclose his expected tax return, and that his alleged lack of awareness of the tax refund was not credible given that he had applied to the IRS for the refund in July of 2002. Pet. App. 26-27. The BAP reasoned:

> [Marrama] appears to have taken affirmative attempts to conceal assets from creditors, beginning with the pre-petition transfer of the Maine Property into a revocable trust. Then, [he] made affirmative misrepresentations on his schedules regarding his homestead exemption, the value of his interest in the Trust, and the rental income generated by the Massachusetts Property. Additionally, [he] did not initiate disclosure of the assets, and only did so when asked direct questions at the § 341 meeting. Thus, [Marrama] did not take steps to preserve his assets for the benefit of his creditors . . .; instead, the intent behind [Marrama's] transfer of the Maine Property for no consideration was to preserve the asset for his personal benefit, and place it beyond the reach of his creditors. . . . Furthermore, . . . there seems to have been a pattern of attempts to conceal assets . . . .

Pet. App. 27-28. The court concluded: "The bankruptcy court was correct in denying [Marrama's] request for conversion because of

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[11] On August 11, 2003 (shortly before the hearing on the Motion to Convert), Marrama filed amended schedules I and J to reflect an increase in monthly "take-home" pay of approximately $1,400, in large part due to Marrama's recognition of $1,500 in income from real property. *See* SJA 30-31; Pet. App. 13. Marrama testified, however, that his income from real property rental was $2,150. JA 72a. Marrama also claimed an increase in monthly expenses of approximately $900, which absorbed some of his increased income. *Compare* SJA 18-19 *with* SJA 30-31. Marrama did not at this time amend schedule B or his Statement of Financial Affairs.

the existence of 'extreme circumstances' constituting bad faith." Pet. App. 28.

F. The First Circuit's Affirmance

Marrama next appealed to the First Circuit, which also affirmed. Pet. App. 29. The court concluded that conversion under section 706(a) from chapter 7 to 13 is not a matter of absolute right, but that a bankruptcy court could deny conversion upon a determination that the debtor acted in bad faith. Pet. App. 40; *see also id.* at 34 (noting presumption in favor of conversion). The court stated:

> [S]ubsection 706(a) is to be viewed in light of a fundamental canon of the Bankruptcy Code: a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims.

Pet. App. 32 (citation omitted).

Analyzing section 706(a), the court looked not only to the text of the provision, but also compared it to different sections of the Bankruptcy Code, with particular focus on sections 105(a), 109(e), 706(d), 1112, 1208 and 1307(b), as well as Bankruptcy Rules 1017(f) and 2002(a)(4). Pet. App. 31-40. The court reasoned that if Congress had intended to eliminate or restrict the bankruptcy court's discretion in denying conversion on grounds of bad faith, it could easily have done so, as it has limited the bankruptcy court's discretion in other sections of the Code, but has not in section 706(a). *Id.*

The court also considered it "important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition . . . based upon a showing of 'bad faith' on the part of the debtor." Pet. App. 36 (citations omitted); *see* 11 U.S.C. § 1307 (authorizing dismissal of a chapter 13 case for "cause," including bad faith). The court stated that it could discern no reason why Congress would authorize a bankruptcy court to turn down a

bankruptcy case filed initially under chapter 13 on grounds of bad faith, but deny a bankruptcy court from turning down a case commenced initially under chapter 7 and then converted to chapter 13. *Id.*

The court further analyzed the legislative history behind section 706(a), as well as the essential policies underlying the chapter 13 repayment plan process. Pet. App. 36-38. The court reasoned that none of the purposes and policies of chapter 13 would be served by allowing a debtor who engages in bad-faith conduct to convert his or her case to avoid a trustee's investigation and recovery of concealed property. *Id.* at 39 ("A legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an ongoing scheme to retain his non-exempt assets from bona fide creditors.").

The court also considered the efficient operation of bankruptcy proceedings, and the bankruptcy court's clear discretionary authority under section 1307 of the Code "to reconvert a chapter 13 case to chapter 7 at a subsequent stage of the proceedings where the debtor has acted in 'bad faith.'" Pet. App. 39. The court observed:

> [I]t would ill serve general policies aimed at promoting the efficient administration of bankruptcy cases to insist that a bankruptcy court - already confronted with clear evidence of a debtor's bad faith - must indulge in the technical formality of converting the chapter 7 case to chapter 13, knowing full well that eventually the case must be reconverted by reason of the same bad faith. Absent some plausible policy justification for such pointless spinning of the judicial wheels, we cannot construe subsection 706(a) as requiring it. . . . Congress may well have envisioned - altogether reasonably - that the bankruptcy court could nip in the bud manipulative conduct on the part of a 'bad faith' debtor at the moment of conversion, pursuant to subsection 706(a), rather than only after the case has been converted.

Pet. App. 39-40.

Reviewing the facts of the case, the court found that the bankruptcy court's "determination that Marrama engaged in 'bad faith' conduct is amply supported by the record." Pet. App. 41. The court noted:

> The instant case comports in all material respects with the classic profile of playing fast and loose with the bankruptcy process. First, Marrama engaged in prepetition transfers of valuable property with the acknowledged intention of insulating the transfers from creditors, submitted a chapter 7 petition, then omitted to mention these same assets and transfers in the bankruptcy schedules, presumably in the expectation that the chapter 7 trustee would not discover their concealment. As the effort at camouflage failed, Marrama moved to convert the case to chapter 13, predicated upon the uncorroborated assertion that he was receiving regular income sufficient to entitle him to protection under chapter 13. Conveniently, the instant conversion (which Marrama characterizes as an "absolute" matter of right impregnable to challenge either by the trustee or the bankruptcy court) would divest the chapter 7 trustee of any authority to act [on] behalf of the estate to safeguard its assets. Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in "property of the estate," *as well as the concealed property*.

Pet. App. 42 (citations omitted) (emphasis in original). Concluding that Marrama's disclosures "demonstrated abundant indicia of intentional concealment," and that Marrama's explanations for his conduct "strain[ed] credulity," the court affirmed the decisions below. Pet. App. 42-44.

G. Further Proceedings

During the pendency of Marrama's various appeals of the bankruptcy court's order denying his Motion to Convert, his chapter 7 case continued. In a separate adversary proceeding, Citizens Bank argued that Marrama should be denied a chapter 7 discharge under section 727(a)(2)(A) of the Code, 11 U.S.C.

§ 727(a)(2)(A). *See Marrama III*, 331 B.R. 10 (D. Mass. 2005). Citizens Bank contended that Marrama made transfers of property, within one year of the commencement of his bankruptcy case, with the actual intent of hindering, delaying, or defrauding a creditor. *Id.* at 15. Agreeing, the bankruptcy court denied Marrama a chapter 7 discharge. *See id.* at 10. On appeal, the district court affirmed, *see id.*, as did the court of appeals, *Marrama IV*, 445 F.3d at 524 (concluding that "an array of undisputed facts support nearly every indication of fraudulent intent that we have recognized," and holding that "[t]here is only one reasonable inference that can be drawn from this record: that Marrama transferred valuable assets belonging to him, less than a year before he petitioned for bankruptcy protection, with the actual intent to defraud his creditors.").

On June 13, 2006, the day after this Court granted certiorari in this case, and while Marrama's chapter 7 case remained pending, Marrama commenced a separate chapter 13 bankruptcy case in the bankruptcy court. *See Marrama V*, 345 B.R. at 461-62. In his schedules filed with his chapter 13 petition, Marrama provided information that the bankruptcy court found to be inconsistent with the information provided in his chapter 7 case. *See id.* at 470-72 ("While the debtor seeks mightily to describe the Chapter 7 as his previous case and irrelevant, the Chapter 7 is, in fact, a pending case wherein the docket and claims register contain a wealth of information. The debtor could and should have consulted this information when he filed the Chapter 13."). Marrama also filed a chapter 13 plan that provided for a $0.00 payment to creditors. *Id.* at 463. The bankruptcy court dismissed his chapter 13 case. *Id.* at 460.

SUMMARY OF ARGUMENT

The court of appeals properly concluded that the bankruptcy court had the necessary authority to deny the conversion of Marrama's chapter 7 case to a proceeding under chapter 13, and that the bankruptcy court properly exercised its authority in doing so. First, bankruptcy courts, like other federal courts, have "inherent power" to "fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501

U.S. 32, 49 (1991). In this case, the bankruptcy court properly viewed Marrama's effort to convert his case as part of a bad faith scheme to abuse the bankruptcy system - among other things, to avoid a chapter 7 trustee seeking to recover concealed property. *See* 11 U.S.C. § 348(e) (services of a trustee are terminated upon conversion of a case). As this Court has explained, "'we do not lightly assume that Congress has intended to depart from established principles,' such as the scope of a court's inherent power," *id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)), and nothing in section 706(a) of the Bankruptcy Code authorizing conversion of a bankruptcy case from chapter 7 to chapter 13 even remotely displaces the bankruptcy court's inherent authority to deny conversion on grounds of bad faith or to prevent abuse. By its terms, section 706(a) is conditional, not absolute. If Congress had intended to confer an absolute right to convert displacing a bankruptcy court's discretionary authority, it could easily have done so. The fact that Congress did not do so demonstrates that no absolute right of conversion exists, and certainly no right exists sufficient to displace the bankruptcy court's inherent power to deny relief on grounds of bad faith or to prevent abuse.

Second, section 706(a) must be construed in context with other provisions of the Code, as well as in harmony with the Code's overall structure. In contrast to section 706(a), other provisions of the Code direct mandatory action or relief in unmistakably clear terms. In contrast, Congress crafted section 706(a) using language that it uses when it grants permissive authority. Likewise, reference to other provisions of the Code demonstrates that Congress did not provide for unfettered access to chapter 13 relief, either directly by filing a chapter 13 petition, or on conversion of a case commenced under some other chapter to one under chapter 13. Read in context with other provisions, section 706 cannot be construed as conferring an absolute right on Marrama to have his case converted to a proceeding under chapter 13, and the bankruptcy court was plainly authorized to deny his conversion attempt on grounds of bad faith or to prevent abuse.

Third, this Court has long recognized the bankruptcy courts' inherent authority to take action to remedy bad faith conduct or prevent abuse of the bankruptcy system. Prior to the enactment of the current Bankruptcy Code, this Court endorsed this long-standing practice. There is no evidence that Congress intended to alter this critical aspect of bankruptcy administration in the enactment of the Code or section 706(a), and, accordingly, the Court should conclude that it endures.

Fourth, withdrawing from the bankruptcy courts the authority to take the steps that the court below took in this case would be disastrous for the administration of bankruptcy proceedings. Fifth, recognizing the bankruptcy court's authority is essential to fulfill the salient bankruptcy policy of preserving bankruptcy relief for the "honest but unfortunate" debtor. Finally, allowing Marrama an absolute right to convert would be manifestly inequitable. For these reasons, the Court should affirm the judgment of the court of appeals.

ARGUMENT

A. Bankruptcy Courts Have Inherent Authority To Deny Conversion On Grounds Of Bad Faith And To Prevent Abuse, And Nothing In Section 706(a) Supplants That Authority.

As this Court has long recognized, federal courts have certain inherent powers arising from "the nature of their institution" that must exist "because they are necessary to the exercise of all other [powers]." *United States v. Hudson*, 11 U.S. 32, 34 (1812). These include the inherent authority to "punish for contempts," *Ex parte Robinson*, 86 U.S. 505, 510 (1834); to "impose silence, respect and decorum, in their presence, and submission to their lawful mandates," *Anderson v. Dunn*, 19 U.S. 204, 227 (1821); to discipline attorneys appearing before the court, *Ex parte Burr*, 22 U.S. 529, 530-31 (1824); to vacate a prior judgment upon proof that it was procured by fraud, *Universal Oil Prods Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-50 (1944); to dismiss a case outright to avoid abuse of the judicial system, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980); *Link v. Wabash R. Co.*,

370 U.S. 626, 630-32 (1962); and otherwise "to fashion an appropriate sanction for conduct which abuses the judicial process," including imposing attorneys' fees not otherwise authorized by statute for bad-faith conduct, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 49 (1991). As the Court explained in *Chambers*:

> The imposition of sanctions [for bad-faith conduct] transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.

Chambers, 501 U.S. at 46 (citations and internal quotation marks omitted).

Even where Congress has prescribed specific mechanisms for deterring bad faith and abuse of the judicial system, the presumption of the ongoing vitality of a court's inherent authority is strong. Although "[i]t is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule . . . 'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Id.* at 47 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). This is especially true if any Congressionally prescribed mechanisms for combating bad faith and abuse are less than comprehensive. As the Court held in *Chambers*:

> We discern no basis for holding that the sanctioning scheme of the statute and rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. . . . At the very least, the inherent power must continue to fill in the interstices.

Chambers, 501 U.S. at 46.

Recognition of a court's inherent authority to sanction bad-faith conduct and prevent abuse of the judicial system is all the more imperative in the bankruptcy context. As this Court has explained, bankruptcy courts "are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" *Young v. United States*, 535 U.S. 43, 50 (2002) (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)); *see also Bank of Marin v. England*, 385 U.S. 99, 103 (1966) ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 457 (1940) ("Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part."). Chief among these equitable principles and rules is the concept that a debtor who seeks relief under the Bankruptcy Code must act in good faith and not for any improper purpose. As this Court has explained, "[o]nly exemplary motives and scrupulous good faith" can stir a court of equity to grant relief in bankruptcy. *Shapiro v. Wilgus*, 287 U.S. 348, 356-57 (1932); *see also Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (noting that the good faith standard "protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (i.e., avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with 'clean hands.'"); *In re Wiggles*, 7 B.R. 373, 375 (Bankr. N.D. Ga. 1980) (tracing the origins of the concept of good faith in the bankruptcy context to *Shapiro*).

This Court has similarly recognized that bankruptcy courts have long relied upon their inherent equitable powers in passing on and preventing "a wide range of problems arising out of the administration of bankrupt estates." *Pepper*, 308 U.S. at 304. Notably, bankruptcy courts have invoked their inherent equitable authority "to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Id.* at 304-05; *see also Birkett v. Columbia Bank*, 195 U.S. 345, 350-51 (1904) (observing that the

law would "be defective if it permitted the bankrupt to experiment with it - to so manage and use its provisions as to conceal his estate . . . without penalty to him. It is easy to see what results such looseness would permit"); *In re Victory Constr. Co., Inc.*, 9 B.R. 549, 558 (Bankr. C.D. Cal. 1981) (observing that the "borderline" between "fulfillment and perversion" of the provisions of the bankruptcy laws "is patrolled by courts of equity, armed with the doctrine of good faith").

Consistent with these principles, there is no basis for concluding that section 706(a) of the Bankruptcy Code displaces the inherent power of a bankruptcy court to deny conversion as a sanction for a debtor's bad-faith conduct, or to prevent ongoing abuse of the bankruptcy system. Section 706(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. § 706(a). Plainly, nothing in this provision confers upon the debtor an absolute right to convert a case, or otherwise supplants a bankruptcy court's inherent authority to deny conversion in cases (such as this one) involving bad faith or abuse.

To begin with, section 706(a) merely directs that a debtor "may" convert a case from chapter 7 to 13, not that a debtor has an absolute, unqualified right to do so. Use of the term "may" signals both discretion in seeking relief and the full preservation of the court's inherent authority to deny relief in appropriate circumstances. *See United States v. Rodgers*, 461 U.S. 677, 708 (1983) (observing that "reading 'may' as either conferring or confirming a degree of equitable discretion conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion."); *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (construing the terms "may" and "shall" in their

"usual sense - the one act being permissive, the other mandatory."). *Cf. Miller v. French*, 530 U.S. 327, 337-38 (2000) (stating that statute providing for a stay using the mandatory term "shall" should not be read as permissive because to do so would undercut the mandatory command of the statute and that "[i]f Congress had intended to accomplish nothing more [than permissive relief], the language of [the statute] is, at best, an awkward and indirect means to achieve that result.").

Further, although section 706(a) mentions only "the debtor" as the party who may convert a case from chapter 7 to 13, the statutory reference to "the debtor" cannot be construed as limiting the authority of *the court* to deny relief in instances involving bad faith or to prevent abuse. Section 105(a) of the Bankruptcy Code provides expressly: "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a); *see also* 11 U.S.C. § 1109 (defining the phrase "party in interest" to include a "debtor").[12] Plainly, under section 105(a), the court retains the authority to take steps, on its own if necessary, to prevent abusive practices notwithstanding that some other section of the Bankruptcy Code authorizes a party other than the court to take some particular action or seek some particular relief. Moreover, the wording of section 105(a) - that nothing in the Code "shall be construed" to prevent the court from taking

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[12] The above-quoted language of section 105(a) was added to the Code by amendment in 1986. In hearings leading up to the amendment, the Hon. T. Glover Roberts explained: "'Section 105 would be amended [to add the above-quoted text] to recognize judges' inherent authority to control their dockets and manage cases pending before them. This recognition clarifies an area of uncertainty in existing law and thus will eliminate a cause for some needless and wasteful litigation.'" 2 COLLIER ON BANKRUPTCY, ¶ 105.LH[4] at 105-108 n.12. (15th ed. 1998) (quoting statement of the Hon. T. Glover Roberts).

steps to prevent abuse - recognizes implicitly the court's longstanding, inherent authority to do so as a background principle of judicial administration that Congress did not intend to abridge by its general wording of specific sections of the Bankruptcy Code that authorize certain parties to perform specific tasks.

The reference in section 706(a) to "the debtor" as the person who may seek conversion merely recognizes that persons other than the debtor are not authorized to *ask for* the conversion of the debtor's chapter 7 case to a repayment plan or reorganization proceeding under chapters 11, 12 or 13. The reference to "the debtor" as the party who may ask for conversion does not address whether the court *may deny* the debtor's request to convert in appropriate instances. Marrama's construction of section 706(a), which focuses on the fact that debtors alone are identified in the text, merely confuses the question *who can seek conversion* with the question whether conversion *must be granted* at the debtor's sole election. *See* Pet. Br. at 10, 18. As section 105(a) clarifies, the fact that the debtor alone can ask for relief cannot prevent the court from taking action to prevent abuse. On the contrary, the fact that a debtor alone can seek conversion of the case from chapter 7 to chapter 13 simply recognizes that relief under chapter 13 is purely voluntary for compelling constitutional and policy reasons:

> [C]hapter 13 is completely voluntary. This Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The thirteenth amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition. On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be preordained to fail. Therefore, the bill prohibits involuntary cases under chapter 13, and forbids the conversion of a case from chapter 7, liquidation, to chapter 13, unless the debtor requests.

H. Rep. No. 95-595, p. 120, reprinted in 1978 U.S.C.C.A.N. 5963 (footnotes and citations contained therein omitted).

Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys ("Amicus" or "NACBA"), advances the same erroneous proposition as Marrama, arguing that section 706(a) gives the debtor "permission to convert his bankruptcy case, at his sole discretion." *See* NACBA Br. at 8. Section 706(a), however, in no way provides that a debtor's motion to convert must be allowed at the debtor's whim. Indeed, section 706(a) in and of itself imposes textual restrictions on the debtor's ability to convert, providing that the debtor may convert "if the case has not been converted [previously to chapter 7 from some other chapter] under section 1112, 1208, or 1307 of this title." 11 U.S.C. § 706(a). In addition, other sections of the Code impose limitations on conversion under section 706(a), most notably section 706(d): "Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." 11 U.S.C. § 706(d); *see also* 11 U.S.C. § 109 (prescribing who may be a debtor under the different chapters of the Code). Critically, these restrictions say nothing about whether the bankruptcy court may deny conversion on grounds of bad faith or to prevent abuse. Where (as here) the statute at issue imposes *some* statutory restrictions on discretionary relief, but does not specifically address situations of bad faith or other abuse, or mandate an exclusive remedy directed at bad faith or abuse, the court's inherent authority to act is presumptively preserved. *See Chambers*, 501 U.S. at 46.

Invoking the canon "*expressio unius est exclusion alterius*" - the expression of one thing excludes others - NACBA argues that the fact that Congress imposed some express limitations on conversion (e.g., the requirement in section 706(d) that a debtor must be eligible for relief under chapter 13 as a condition for conversion), but not an express restriction for a conversion sought in bad faith, means that Congress did not intend a court to have the authority to deny conversion on grounds of bad faith. NACBA Br. at 13-14. In other words, NACBA contends that, no matter how egregious or abusive the debtor's conduct in seeking conversion, a

bankruptcy court is duty bound to permit the conversion even if it furthers a clear abuse of the bankruptcy system. NACBA's invocation of the *expressio* canon in this context is plainly wide of the mark.

The central point of *Chambers* acknowledging the inherent powers of a court to address bad faith and abuse is to recognize those powers *especially* where Congress has not provided a specific remedy. This follows from the very nature of the courts' powers as *inherent*. If the *expressio* canon applied in the manner that NACBA suggests, then *Chambers* would be a nullity because inherent powers could never exist if some remedy for abusive conduct (however inapplicable, inadequate, or incomplete) were specified somewhere in the relevant judicial system. Moreover, contrary to NACBA's position, this case lends particular credence to the Court's warning that, while "often a valuable servant," the *expressio* canon is "a dangerous master to follow in the construction of statutes." *Ford v. United States*, 273 U.S. 593, 612 (1927) (citation omitted). As the Court has indicated, the canon "ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Id.* (citation omitted). The very point of a court's inherent powers it to *prevent* injustice by allowing the court to address abusive conduct as it arises. Application of the *expressio* rule to eliminate a court's inherent powers on the theory that they have not been expressly established by statute in a particular context would deny the courts in every instance access to their inherent powers precisely when they are most needed - when no adequate, express remedy exists.

Similarly defective is NACBA's argument that courts lack the authority to deny a debtor's request for conversion in cases involving bad faith or abuse on the theory that, if Congress had intended a good faith requirement in section 706(a), it would have provided for one explicitly in that section, as it has in other sections of the Code that do not involve conversions. NACBA Br. at 15. NACBA's argument, however, serves only to illustrate why the bankruptcy court's resort to its inherent authority was appropriate in this case - because other sections of the Code that

contain good faith requirements (e.g., section 1325(a)(3) governing confirmation of a chapter 13 plan) do not apply to conversion motions under section 706(a) and are thus insufficient to address the particular bad faith and abuse at issue in the context of Marrama's Motion to Convert. Moreover, the Court has previously rejected in the bankruptcy context the very argument that NACBA advances in its brief. As discussed in Part C *infra*, the Court in *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 456-57 (1940), expressly endorsed a court's inherent authority to refuse bankruptcy relief to protect "its own jurisdiction from misuse" in a context in which the particular bankruptcy procedure at issue (former Chapter XI of the Bankruptcy Act) had no express good faith requirement, in contrast to other bankruptcy procedures that did (e.g., former Chapter X of the Bankruptcy Act). As further discussed in Part C *infra*, NACBA's argument is also contrary to this Court's recognition in *Perry v. Commerce Loan Co.*, 383 U.S. 392, 404 (1966), made in the context of discussing former Chapter XIII of the Bankruptcy Act (the predecessor to the current chapter 13) of the inherent "power of the court to make certain that the provisions of the chapter are not abused." These and similar precedents recognizing a court's inherent power to deny relief on grounds of bad faith or abuse are fully consistent with the rationale of *Chambers*, and confirm the bankruptcy court's authority in this case.[13]

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[13] The example that NACBA offers of a hypothetical conversation between two neighbors where one says to the other "[y]ou may use my rake at any time," also misses the point. NACBA Br. at 9-10. It would hardly be reasonable to assume from an authorization of this kind that, if the rake were kept in a locked garage, the neighbor could permissibly break down the garage door to take it. Nor would it be reasonable to assume that the permission could not be revoked if, for example, the neighbor were going to use the rake to harm a third party. Here, there is nothing in the text of section 706(a) that strips the bankruptcy court of its authority - indeed, its duty - to prevent abuse of the bankruptcy system,

Further, the provision in section 706(a) authorizing a debtor to convert a case "at any time" lends no support to the conclusion that section 706(a) limits the court's discretion to deny conversion on grounds of bad faith or to prevent abuse. The plain import of this phrase is purely temporal - a debtor may seek conversion at any time during the bankruptcy case. *See In re Starkey*, 179 B.R. 687, 691-92 (Bankr. N.D. Okla. 1995). The statutory term "at any time" cannot be transformed into a requirement that bankruptcy courts must grant conversion "regardless of the circumstances." *See In re Copper*, 426 F.3d 810, 816 (6th Cir. 2005) ("We agree with the cases finding that the phrase in § 706(a) providing that the debtor may convert 'at any time' refers to a time frame. The phrase does not mean 'regardless of circumstances.'") (citation omitted); *In re Ponzini*, 277 B.R. at 404 (noting that "at any time" does not mean "regardless of circumstances"); *In re Young*, 269 B.R. 816, 822 (Bankr. W.D. Mo. 2001) (same); *In re Starkey*, 179 B.R. at 692 ("The words 'at any time' refer literally to any stage in the progress of a case, not to any conditions which may develop during that progress, especially in an abnormal and abusive case.").

Finally, the fact that section 706(a) states that "[a]ny waiver of the right to convert a case under this subsection is unenforceable" also says nothing about the court's inherent discretion to deny conversion in cases involving bad faith or abuse. The provision directs merely that the debtor's ability to convert is not waivable; it does not define the scope of the debtor's ability to convert in the first instance. The principle evil that the provision aims to resolve is straightforward: if the debtor's execution of a waiver of the ability to convert were enforceable, a creditor (or group of creditors) could commence an involuntary chapter 7 liquidation case against the debtor without the debtor being able to convert the case to some other proceeding - even if doing so would be more advantageous to the debtor and other creditors because, under some other chapter, the debtor may be able to repay more of his or

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and nothing that prevents a bankruptcy court from denying a debtor's motion to convert a chapter 7 case to chapter 13 for bad faith.

her debts through a repayment plan or reorganization proceeding. *See In re Copper*, 426 F.3d at 637. *Cf.* 11 U.S.C. § 522(e) (overriding a waiver of the debtor's ability to exempt property). The anti-waiver provision - directed at a potentially abusive practice by creditors - says nothing about whether the bankruptcy court may prevent *the debtor* from converting from chapter 7 to 13 in cases involving the debtor's bad faith or abuse.

B. Consideration Of The Structure And Text Of The Bankruptcy Code As A Whole Demonstrates That Bankruptcy Courts Retain Inherent Authority To Deny Conversion In Cases Involving Bad Faith Or To Prevent Abuse.

As this Court has instructed, the provisions of the Bankruptcy Code must be construed "holistically," taking into account the structure of the Code as a whole, the relationship between its various provisions, and Congress' collective and systematic choice of words. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 369-71 (1988) (construing several sections of the Bankruptcy Code together and observing that "[s]tatutory construction is a holistic endeavor."); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (citations omitted); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (noting same principles). Reference to the text and structure of the Code as a whole further demonstrates that Congress did not in section 706(a) limit a bankruptcy court's inherent authority to deny conversion of a case from chapter 7 to 13 for bad faith or to prevent abuse.

If Congress had intended to strip the bankruptcy courts of discretion in determining whether to convert a chapter 7 case to chapter 13 on a debtor's request under section 706(a), it could easily have done so. Using unmistakably clear terms, Congress specifically crafted other provisions of the Code to limit the bankruptcy court's discretion to grant or deny relief in the face of a particular request. For example, section 1307(b) - governing dismissal of a chapter 13 case - provides in relevant part that "[o]n

request of the debtor at any time . . . the court *shall* dismiss a case under this chapter." 11 U.S.C. § 1307(b) (emphasis supplied). If Congress had intended the same mandatory direction under section 706(a), it could easily have drafted the provision to provide that "on request of the debtor at any time, the court *shall* convert a case under this chapter to one under chapter 13." Instead, Congress used quite different terms: "The debtor may convert a case under this chapter to a case under chapter . . . 13 of this title at any time . . . ." 11 U.S.C. § 706(a).

The contrast between how Congress could have crafted section 706(a) if Congress had intended it to be mandatory, and how Congress actually crafted section 706(a) as a permissive provision, is all the more starkly illustrated by reference to section 1208 of the Code governing the conversion or dismissal of reorganization proceedings involving family farmers. 11 U.S.C. § 1208. Like section 706(a), section 1208(a) provides that "[t]he debtor *may* convert a case under this chapter to a case under chapter 7 of this title at any time." 11 U.S.C. § 1208(a) (emphasis supplied). In contrast, in the very next subsection of section 1208, Congress provided in relevant part "[o]n request of the debtor at any time, . . . the court *shall dismiss* a case under this title." 11 U.S.C. § 1208(b) (emphasis supplied). Clearly, Congress knew how to direct mandatory relief on the request of the debtor (as expressly provided in section 1208(b)), and how to direct discretionary relief on the debtor's request (as expressly provided in sections 1208(a) and 706(a)).

When Congress employs particular language in a provision of the Bankruptcy Code, it is presumed to act deliberately, and Congress's use of different terms in different provisions also is presumed to be deliberate. *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) (provision appearing in one section of the Code, but not another, demonstrates that Congress did not intend the provision where it does not appear); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 560-61 (1990) (exception appearing in one section of the Bankruptcy Code, but not another, demonstrates that Congress did not intend exception where it was not included); *see Bates v. United States*, 522 U.S. 23,

29-30 (1997) (it is "generally presumed that Congress acts intentionally" in the "disparate inclusion or exclusion" of particular language). If Congress had intended to confer an absolute right of conversion in section 706(a), it would have used the mandatory phraseology that is used elsewhere in the Code, such as in sections 1307(b) and 1208(b). The fact that Congress did not, demonstrates only that Congress did not intend to confer an absolute right of conversion in section 706(a).

Congress otherwise consistently uses the term "shall" in sections of the Bankruptcy Code where Congress intends to convey a mandatory direction, and the term "may" where Congress intends the court to exercise discretion. For example, section 1321 provides that the debtor "*shall* file a plan" in a chapter 13 case, directing plainly that the chapter 13 debtor is to file a plan in all chapter 13 cases. 11 U.S.C. § 1321 (emphasis supplied). In contrast, section 1121 provides that "the debtor *may* file a plan" in a chapter 11 case, recognizing that debtors do not always file chapter 11 plans, but that others file chapter 11 plans under some circumstances. 11 U.S.C. § 1121(a) (emphasis supplied); *see* 11 U.S.C. § 1121(c) (providing that creditors may file a plan in some chapter 11 cases). Similarly, section 1128(a) provides that, in a chapter 11 case, "the court *shall* hold a hearing on confirmation of a plan," directing that a confirmation hearing is mandatory. 11 U.S.C. § 1128(a) (emphasis supplied). In contrast, section 1128(b) provides that "[a] party in interest *may* object to confirmation of a plan," recognizing that a party in interest will object to confirmation only if the party in interest has some reason for doing so. 11 U.S.C. § 1128(b) (emphasis supplied).

As the Court has observed, although the term "may" is sometimes construed to mean "shall," this occurs only where the context "compels such a construction." *Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 662-63 (1923) (citation omitted). Where, as here, "the statute appears to have been drawn with great care," and "throughout the act the distinction is clearly made between what [the parties] 'shall' do and what they 'may' do," the ordinary distinction between the meaning of the terms "may" and "shall"

will be respected. *Id.*; *see also In re Copper*, 426 F.3d at 816 ("[I]t is also relevant that § 706(a) uses the word 'may' meaning 'might' or 'used to express possibility' or 'used to express opportunity or permission.' If Congress had intended to leave the bankruptcy courts with absolutely no discretion in the matter, it would have used the more mandatory phrase of 'shall be able to convert.'") (citations omitted); *In re Ponzini*, 277 B.R. 399, 404 (Bankr. E.D. Ark. 2002) ("Section 706(a) does not contain the word 'absolute' or any other word or phrase indicating that the right to convert is unequivocal.").[14]

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[14] Consistent with Congress's choice of permissive language, many courts interpreting section 706(a) have found that the section creates a presumption in favor of granting conversion, but that the ultimate question of whether conversion is appropriate is left to the bankruptcy court's discretion. *See* Pet. App. 22, 34; *Neely v. Smith (In re Neely)*, 334 B.R. 863, 871-72 (S.D. Tx. 2005) ("The court concludes that § 706(a) is not that absolute. By using 'may' rather than more mandatory language, such as 'shall,' the statute creates a strong presumption in favor of conversion."); *In re Wampler*, 302 B.R. 601, 605 (Bankr. S.D. Ind. 2003) ("The Court emphasizes that motions filed pursuant to § 706(a) should be granted liberally and with the presumption that they are filed in good faith. Accordingly, the party challenging conversion bears the burden of establishing bad faith by a preponderance of the evidence."); *In re Ponzini*, 277 B.R. 399, 405 (Bankr. E.D. Ark. 2002) ("Clearly, the plain language of § 706(a), especially when read in context with other sections of the Bankruptcy Code and Rules, does not grant a debtor an absolute right to convert a chapter 7 case. Rather, a debtor's right to convert is presumptive and should be granted if the court finds it appropriate under the Bankruptcy Code."); *In re Young*, 269 B.R. 816, 823 (Bankr W.D. Mo. 2001) ("In this Court's view, a debtor has a presumptive right to convert a Chapter 7 case to a reorganization case, but that right is not absolute."); *In re Krishnaya*, 263 B.R. 63, 69 (Bankr. S.D.N.Y. 2001) ("[W]hile the right to convert is presumptive and nearly absolute, a bankruptcy court, as the *Marcakis* court observed, still 'must determine if the conversion is appropriate pursuant to the overall purpose and policy of the Bankruptcy Code.'") (citing *In re Marcakis*, 254 B.R. 77, 82 (Bankr. E.D.N.Y. 2000)).

In addition, review of the Bankruptcy Code amply demonstrates that Congress did not intend a debtor to have an absolute right to resort to relief under chapter 13, further defeating the argument that section 706(a) should be construed to confer an absolute right of conversion. To begin with, section 1307(c) expressly provides that "on request of a party in interest [including the debtor or any creditor] or the United States trustee . . . the court . . . may dismiss a case under this chapter . . . for cause." 11 U.S.C. § 1307(c). Although the Code does not define the term "cause," it is widely recognized to include a debtor's bad faith. *See Badalyan v. Holub (In re Badalyan)*, 221 F.3d 1333, Case No. 99-4120, 2000 WL 924591 at *2 (6th Cir. June 26, 2000) (unpublished) ("failure to comply with the bankruptcy court's show cause order was indicative of bad faith and constituted cause to dismiss the case under [section] 1307(c)"); *Harker v. United States*, 112 F.3d 513, Case No. 96-3620, 1997 WL 199507 at *1 (8th Cir. April 25, 1997) (unpublished) ("[A] Chapter 13 petition filed in bad faith may be dismissed . . . 'for cause' under 11 U.S.C. § 1307(c).") (citation omitted); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996) (bad faith constitutes "cause" for purposes of analysis under section 1307(c)); *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996) ("[A] Chapter 13 petition filed in bad faith may be dismissed . . . 'for cause' under 11 U.S.C. § 1307(c). Such cause includes filing a bankruptcy petition in bad faith.") (citing *In re Eisen, infra*); *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994) ("[C]ourts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal."); *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994) (per curiam) ("A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to [section] 1307(c)."); *Gier v. Farmers State Bank of Lucas, Kansas (In re Gier)*, 986 F.2d 1326, 1329-30 (10th Cir. 1993) (affirming dismissal of chapter 13 petition for bad faith); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992) (noting good faith requirement in seeking chapter 13 relief and that "lack of good faith is sufficient cause" for relief under section 1307(c)); *In re Cabral*, 285 B.R. 563, 572 (1st Cir. B.A.P. 2002) (concluding that "lack of good faith (or bad faith) is 'cause' for dismissal . . . of a Chapter 13 case under [section] 1307(c)");

see also NACBA Br. at 15 (conceding that the phrase "for cause" has "uniformly been construed to include bad faith"), 18 (same); 7 COLLIER ON BANKRUPTCY, ¶ 1112.07[2] & [3] at 1112-64.8 - 1112-70 (15th ed. 2000) (discussing doctrine of good faith in the context of section 1112 of the Bankruptcy Code).

Given the bankruptcy court's recognized authority to dismiss a case commenced originally as a chapter 13 case on grounds of bad faith, it is difficult to understand why a bankruptcy court cannot also prevent the conversion of a chapter 7 case to a case under chapter 13 likewise on grounds of bad faith. This analysis is bolstered by the fact that, in addition to authorizing dismissal of a chapter 13 case for cause (including bad faith), section 1307(c) also authorizes in the alternative the conversion of a chapter 13 case to a proceeding under chapter 7 for cause (including bad faith): "on request of a party in interest or the United States trustee . . . the court may convert a case under this chapter to a case under chapter 7 . . . for cause . . . ." 11 U.S.C. § 1307(c). *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996) (converting case pursuant to section 1307(c) upon finding of bad faith that constituted "cause" for conversion); *see also* Pet. Br. at 23-24 (conceding authority to reconvert for cause under section 1307); Reply on Conversion (discussed at n.10, *supra*); NACBA Br. at 18 (conceding that a court may convert a case from chapter 13 to chapter 7 for cause, including bad faith).

The fact that section 1307(c) expressly authorizes a bankruptcy court to convert a chapter 13 case to one under chapter 7 for bad faith demonstrates that Marrama has no entitlement to chapter 13 relief. Indeed, under the facts presented, conversion of his chapter 7 case to chapter 13 would simply have resulted in the reconversion of his chapter 13 case back to chapter 7.

Marrama suggests that this is how matters should have played out: that he had an absolute right to convert to chapter 13, and then was entitled to defend a motion brought under section 1307(c) to send his case back to chapter 7 with whatever defenses he could come up with. Pet. Br. at 24-25; *see also* NACBA Br. at 18-19. But there is no reason why, in considering Marrama's motion to convert under section 706(a) in the first instance, the bankruptcy

court was required to cast a blind eye on Marrama's bad faith or the provisions of chapter 13 that would have required sending Marrama's case back to chapter 7, rendering his conversion entirely futile. This is especially true given that, pursuant to the express terms of section 105(a), the bankruptcy court is not required to wait for a party in interest to file a motion under section 1307(c) before reconverting a chapter 13 case back to chapter 7, but may act *sua sponte*. Marrama's argument is the epitome of form over substance and would simply clog the machinery of bankruptcy with unnecessary, and unwarranted, debris.

More important, the existence of section 1307(c) (permitting dismissal or conversion of a chapter 13 case for cause including bad faith) plainly demonstrates that Congress did not intend unfettered resort to relief under chapter 13. This undercuts dramatically Marrama's contention that he must have a right to convert under section 706(a) on the theory that Congress intended to promote chapter 13 repayment plans. Because the grounds for denial of conversion in this case (i.e., Marrama's bad faith) also suffice to deny access to chapter 13 relief under section 1307(c), construing the permissive language of section 706(a) to deny conversion for bad faith is perfectly consistent with Congress's overall statutory scheme.[15]

Finally, the bankruptcy court's denial of Marrama's Motion to Convert is also perfectly consistent with - and authorized by -

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[15] Marrama's argument that he was deprived of due process, Pet. Br. at 23-26, rings hollow. In his reply papers filed with the bankruptcy court, Marrama treated the Trustee's opposition to his Motion to Convert "as a motion to reconsider conversion," and cited *In re Cabral*, *supra*, as illustrative of that concept. *See* JA 2a; Reply on Conversion (*see* n.10, *supra*). Marrama thus effectively treated the hearing as though it were a motion to reconvert under section 1307(c). In addition, as the court of appeals observed, Marrama never requested an evidentiary hearing, nor has he ever identified what additional evidentiary materials he would have introduced or how an evidentiary (or other) hearing would make any difference in the outcome. Pet App. 43.

section 105(a) of the Bankruptcy Code. In addition to directing that no provision of the Code providing that a particular party in interest may take some particular action shall be construed to preclude the bankruptcy court from acting to prevent abuse, section 105(a) also provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).[16] As noted, one of the obligations imposed by the Code is the debtor's duty to timely disclose his or her assets and financial dealings. 11 U.S.C. § 521. Further, the duties of the Trustee included collecting Marrama's assets and investigating his financial affairs. 11 U.S.C. § 704(a)(1) & (4). Here, Marrama sought to convert his case as part of a scheme to conceal assets and avoid the Trustee, who would be disenfranchised if the case were converted. 11 U.S.C. § 348(e). Pursuant to section 105(a), the bankruptcy court was perfectly justified in denying Marrama's motion in order to vindicate the requirements of section 521 and enable the Trustee to carry out his responsibilities in the face of the debtor's bad-faith effort to prevent him from doing so. Because section 706(a) does not confer an absolute right to convert, the bankruptcy court's denial of

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[16] The above-quoted language of section 105(a) was derived from former section 2a(15) of the Bankruptcy Act of 1898, 11 U.S.C. § 11(a)(15) (repealed 1979). Section 2a(15) authorized the bankruptcy courts to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." As noted in the *Collier*, Treatise "current section 105(a) is much broader than former Section 2a(15) . . . . Unlike the restriction under prior law that an order of a bankruptcy court must be 'necessary for the enforcement of the provisions of this title,' section 105 authorizes the bankruptcy court to also issue orders "appropriate to carry out the provisions of this title." This change evidenced Congress's intent that bankruptcy courts would, under the Bankruptcy Code, deal with all phases and aspects of a bankruptcy case." 2 COLLIER ON BANKRUPTCY, ¶ 105LH[2] at 105-106 (15th ed. 1998).

Marrama's motion was fully warranted and authorized under section 105(a).

C. Historical Practice And Interpretation Of The Bankruptcy Laws, Presumed To Endure, Demonstrate That Bankruptcy Courts Retain Their Inherent Authority To Deny Conversion In Cases Involving Bad Faith Or To Prevent Abuse.

This Court has explained that, "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (internal quotation marks and citation omitted). As the Court has further stated: "We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (quoting *Davenport*, 495 U.S. at 563); *see United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 500-02 (1986); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these provisions [of the Bankruptcy Act] there is need to keep in view the background of their history."). For well over a century, bankruptcy courts have exercised the authority to deny bankruptcy relief on grounds of bad faith and to prevent abuse. There is no indication that Congress intended to abrogate this practice in enacting the provisions of the Bankruptcy Code generally, or section 706(a) specifically. Accordingly, the Court should conclude that this longstanding practice endures.

The requirement of good faith as a prerequisite to bankruptcy relief has ancient roots. As the Securities and Exchange Commission explained in discussing the concept of good faith in its report to Congress on corporate reorganization practices in the 1930's and 1940's: "When a corporation avails itself of the protection of the bankruptcy court, it is enabled to stave off its creditors. The court protects its property from dismemberment by executions and attachments. It has the benefit of what in equity was called the 'chancellor's umbrella.'" Securities and Exchange Commission, REPORT ON THE STUDY AND INVESTIGATION OF THE

WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, Pt. VIII, p. 107 (1940) ("SEC Report") (citation omitted). But it has long been held that resort to the chancellor's umbrella is available only to debtors in bankruptcy who show "exemplary motives and scrupulous good faith." *Shapiro*, 287 U.S. at 356-57. In some of the bankruptcy provisions that Congress has enacted over the past century it has specifically incorporated a good faith requirement as a precondition for certain relief. In others, however, it has not. And where Congress has not incorporated an express good faith requirement, this Court has directed nonetheless that one exists as an inherent precondition and that bankruptcy courts have inherent authority to remedy bad faith conduct and prevent abuse. *SEC v. US Realty & Improvement Co.*, 310 U.S. at 457-58 (1940) (discussed below); *see Little Creek Dev. Co.*, 779 F.2d at 1071-72 (reviewing the relevant history and stating that "[e]very bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings").

In defining more precisely the boundaries of legitimate resort to bankruptcy relief, this Court has made it clear from the outset that abusive practices will not be tolerated. *First Nat'l Bank of Cincinnati v. Flershem*, 290 U.S. 504, 517 (1934). Condemning a bankruptcy proceeding on the ground that the debtor did not actually require bankruptcy relief and had staged its defaults needlessly, the Court stated:

> The substantive law affords no warrant for so abridging the rights of individual creditors. . . . The power of the District Court was invoked, not to enforce the rights of creditors, but to defeat them. The fact that the [district court approved the proceeding] does not remove the taint of illegality.

Id. at 518-19.

Although *Flershem* arose out of an equity receivership proceeding, the case is significant for two reasons. First, as a general matter, the doctrine of good faith derives in significant part from equity receivership practice. *See Shapiro*, 287 U.S. at 356-57

(requiring good faith as condition of relief in equity receivership case); 6 COLLIER ON BANKRUPTCY, ¶ 6.07 at 1042 (14th ed. 1988) ("The idea that reorganization cases should be founded on [good faith] undoubtedly was an outgrowth of the equity receivership background of § 77B."). Second, as the relevant history reveals, the basic principles of *Flershem* have survived each subsequent iteration of the nation's bankruptcy laws and have endured as an integral part of contemporary jurisprudence.

In 1933, Congress largely codified existing equity receivership practice with the enactment of Section 77B of the former Bankruptcy Act. Consistent with *Flershem*, Section 77B limited reorganization relief to firms that demonstrated a "need for relief." 11 U.S.C. § 207 (repealed 1938). Likewise, Section 77B instructed courts to accept a bankruptcy petition only if filed "in good faith." *Id.*

As the SEC - and later this Court - explained, courts reviewing bankruptcy petitions under Section 77B properly concluded that a corporation that failed to demonstrate a genuine need for relief lacked good faith. *See* SEC Report at 94 (under Section 77B, "the 'need for relief' which a debtor was obliged to show was a need for the machinery of 77B as an essential in accomplishing a reorganization . . . [i]n the cases cited, it was the debtor's inability to show this . . . that led the courts to find an absence of good faith."); *Marine Harbor Props., Inc. v. Manufacturer's Trust Co.*, 317 U.S. 78, 84 (1942) (quoting SEC Report and dismissing case for lack of good faith).

In 1938, Congress replaced Section 77B with Chapters X (reorganization) and XI (reorganization) as part of the Chandler Act amendments. Like Section 77B, Chapter X applied only to corporations that demonstrated a "need for relief." 11 U.S.C. § 530 (repealed 1979). In addition, section 141 required dismissal if the petition had not been filed "in good faith." 11 U.S.C. § 541 (repealed 1979). In turn, section 146 provided examples of the absence of good faith. 11 U.S.C. § 546 (repealed 1979). As the legislative history explained, however, the examples were not intended to be exhaustive, and the courts treated them as illustrative only. *See* Hearing on H.R. 6439, 75th Cong., 1st Sess.

40-41 (1937) ("although we have set up standards, we have not made an inflexible meaning of the phrase 'good faith' . . . [s]o that, in case it shall appear under peculiar circumstances that good faith was not used in connection with the filing of the petition, the court may nevertheless dismiss it"); *In re Julius Roehrs Co.*, 115 F.2d 723, 724 (3d Cir. 1940) ("[T]he petition may not be found to be filed in good faith if it is within any of the prohibitions set forth by Section 146, though it must also be borne in mind that the generality of the meaning of the term 'good faith' is not to be limited by the specific provisions of the section."); 6 COLLIER ON BANKRUPTCY, ¶ 6.07 at 1045 (14th ed. 1988) ("the statutory enumeration, while inclusive, is not exclusive."). As this Court observed, section 146 "represents a codification of some of the interpretations which the courts had given the words 'good faith' in proceedings under § 77B." *Marine Harbor*, 317 U.S. at 84.

Like Chapter X, relief under Chapter XI of the Act of 1898 was also limited to debtors in need of relief. 11 U.S.C. § 723 (repealed 1979). Unlike section 141 of Chapter X, however, Chapter XI contained *no express authorization* for dismissal of a petition for lack of good faith. In 1940, legislation was introduced in Congress to add a new provision to Chapter XI that would have mirrored the express "good faith" requirement under Chapter X. But as explained in the legislative materials, the provision was dropped as unnecessary after this Court's decision in *US Realty*, which recognized the bankruptcy court's inherent authority to dismiss a Chapter XI case to avoid misuse of the proceeding. *See* 8 COLLIER ON BANKRUPTCY, ¶ 4.11 at 413 n. 7 (14th ed. 1988) (citing and discussing the history of the proposed amendment).

In *US Realty*, a debtor filed for relief under Chapter XI seeking to adjust its unsecured liability as the guarantor of certain debts of its affiliate. Significantly, the debtor proposed to adjust *only* its unsecured guaranty liability, leaving unaffected its other secured and unsecured obligations, and likewise leaving undisturbed the interests of its stockholders. Recognizing that the debtor met the technical requirements for a petition for relief under Chapter XI, the Court nevertheless inquired as to "the propriety, in the circumstances, of [the bankruptcy court's] order retaining

jurisdiction, and of the extent of its duty to go forward with the proceeding under Chapter XI . . . ." *US Realty*, 310 U.S. at 447. Addressing the question of propriety, the Court focused on "the authority of the court clothed with equity powers and sitting in bankruptcy . . . to withhold relief . . . ." *Id.* at 448.

As the Court explained, Chapter XI proscribed the alteration of shareholder interests and secured obligations, permitting only the adjustment of unsecured debt. *Id.* at 452-53. At the same time, Chapter XI also required adherence to absolute priority. *Id.* Consistent with the absolute priority doctrine, the shareholders could not retain their interests without a new value contribution if the rights of unsecured creditors were diminished, and the Court found the debtor's proposal to be objectionable on this ground. The Court then concluded that the petition had to be dismissed in favor of relief under Chapter X because the Court found Chapter X to offer a better means to accommodate the debtor's circumstances and likewise protect the interests of the debtor's unsecured creditors. *Id.* at 456-57.

In reaching this conclusion, the Court remarked that "[a] bankruptcy court is a court of equity . . . and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act." *Id.* at 454. The Court continued:

> [W]e cannot assume that Congress has disregarded well settled principles of equity [in its enactment of bankruptcy legislation]. Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part. If respondent had sought relief by way of an equity receivership such would have been the duty of the Court. We think it is no less so here. . . . [I]t has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition to move for the vacation of an adjudication or the dismissal of a petition on grounds, whether strictly jurisdictional or not, that the proceeding ought not to be allowed to proceed.

Id. at 457-58; *see also Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940) (quoting *US Realty* and recognizing equitable power of bankruptcy court to prevent misuse of bankruptcy law).

In applying the doctrine of good faith under the current Bankruptcy Code, courts have recognized that its contours are not a modern invention. Rather, in applying the doctrine, courts have drawn upon the experience and conclusions of their predecessors reviewing petitions under equity receivership practice, Section 77B, Chapter X, and Chapter XI. *See, e.g., Little Creek Dev. Co.*, 779 F.2d at 1071-72. This is entirely appropriate. As this Court has held repeatedly: "'[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.'" *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986)); *see also Archer v. Warner*, 538 U.S. 314, 319 (2003) (following prior precedent in interpreting scope of debtor's discharge); *Kelly*, 479 U.S. at 47 (stating that the Court follows its interpretative approach of presuming the continuation of prior practice "with particular care in construing the scope of bankruptcy codifications"); *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 220-21 (1996) (adhering to the traditional bankruptcy interpretation of the concept of an excise tax); *United States v. Noland*, 517 U.S. 535, 539 (1996) (following *Midlantic*); *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115 (1939) (interpreting the phrase "fair and equitable" as used in Section 77B as having acquired a "fixed meaning" through judicial interpretation in the field of equity receiverships).

To the extent that it permits conversion of a chapter 7 case to one under chapter 13, section 706(a) of the Bankruptcy Code derives from former section 621 of the Bankruptcy Act of 1898, 11 U.S.C. § 1021 (repealed 1979). In order to convert from a liquidation case to a repayment plan proceeding under former Chapter XIII, section 621 specified that the debtor was required to file a new Chapter XIII petition in the pending liquidation case. All the requirements of good faith for the filing of a petition applied, and the bankruptcy court had inherent authority to deny

Chapter XIII relief to prevent abuse. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 404 (1966) (discussing Chapter XIII and recognizing the inherent "power of the court to make certain that the provisions of the chapter are not abused"). As explained in Collier:

> [I]n a proper case, the petition can be dismissed. If the court lacks jurisdiction, or if the jurisdiction of the court has been imposed upon, and the proceeding ought not to be allowed to proceed, either . . . because of fraud or other adequate ground, there is undoubtedly power in the Chapter XIII court to dismiss the petition for relief under Chapter XIII.

10 COLLIER ON BANKRUPTCY, ¶ 24.12 at 152 (14th ed. 1974) (emphasis supplied); *see, e.g., In re Herndon Executive Center, Inc.*, 36 B.R. 803, 805 (Bankr. M.D. Fla. 1984) (observing that, although former Chapter XIII did not contain an express requirement of good faith, "[n]evertheless, the courts were not hesitant to use the concept of good faith as an implied requirement for filing and maintaining a case under [Chapter XIII] in spite of the absence of a specific requirement to show good faith . . . as an effective means to prevent abusive filings"); *see also In re Webb*, 253 F. Supp. 757, 758 (E.D. Va. 1966) (dismissing Chapter XIII case as abusive). There is no reason to conclude that, when Congress enacted the Bankruptcy Code it intended to abrogate the requirements of good faith developed under its predecessor statutes, or the bankruptcy court's longstanding, inherent authority to deny relief on grounds of bad faith or abuse acknowledged by this Court in the Chapter XIII context in *Perry*.

Ignoring the weight of history, Marrama argues that reference to a passage in the legislative history to section 706(a) undercuts the bankruptcy court's inherent authority. Marrama is mistaken. The legislative history to section 706(a) states that "[s]ubsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case." S.Rep. No. 95-989, at 94, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. A key problem with this statement, however, is that, taken literally, it does not square with the statute.

The term "absolute" cannot actually mean "absolute" because, as noted, sections 706(a), 706(d), and 109(e) prescribe statutory restrictions on a debtor's ability to convert from chapter 7 to 13. 11 U.S.C. § 706(a) (restricting conversion if the case had already been converted to chapter 7 from some other chapter), 706(d) (denying conversion if the debtor is ineligible to be a debtor under chapter 13), 109(e) (detailing eligibility requirements for resort to chapter 13). More reasonably, the reference in the legislative history to a "one-time absolute right" to convert means what section 706(a) actually says - that the debtor's ability to convert is "absolute" in the sense that it cannot be waived by contract, and the debtor has "one" chance to convert to some other chapter, and may not engage in multiple conversions. 11 U.S.C. § 706(a) (providing that "[a]ny waiver of the right to convert a case under this subsection is unenforceable" and that the debtor may convert to chapter 13 under the section unless the case has already been converted to chapter 7 from some other chapter).

In any event, there is no indication that the ambiguous reference in the legislative history to a "one-time absolute right" reflects any deliberate intention to abandon or diminish the bankruptcy court's longstanding, inherent power to deny bankruptcy relief on grounds of bad faith or to prevent abuse. More important, because the reference in the legislative history is, at best, ambiguous, it is insufficient to overcome the strong presumption of the preservation of a court's inherent authority backed in the bankruptcy context by a century of precedent and practice and the literal text of the governing statutory scheme. *See In re Young*, 269 B.R. 816, 823 (Bankr. W.D. Mo. 2001) ("The notion that a debtor has an 'absolute right' to convert arises from the use of that phrase in the legislative history . . . rather than from the language of the statute itself. This Court will not read that phrase literally into the statute; it is not warranted and leads to an erroneous conclusion."); *In re Starkey*, 179 B.R. 687, 692 (Bankr. N.D. Okl. 1995) ("The phrase 'absolute right' comes not from the statute, but from the statute's legislative history. . . . The Court is not asked to apply the statute literally; the Court is asked to read

these committee comments into the statute and apply *these comments* literally.").

D. Recognizing The Bankruptcy Court's Inherent Authority To Deny Conversion In Cases Involving Bad Faith Or To Prevent Abuse Is Necessary To Fulfill The Policies And Purposes Of The Bankruptcy Code.

The shelter of bankruptcy law is intended to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (internal quotation marks and citation omitted). As the Court continued in *Hunt*:

> This purpose of the Act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the [A]ct.

Id., at 244-45 (1934) (citations omitted); *see Perry*, 383 U.S. at 396 ("[C]hapter XIII [of the former Bankruptcy Act] . . . creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy."); *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 514 (1938) ("The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness and permitting him to start afresh."); *Cont'l Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 670-71 (1935) (relief for honest debtors was "[o]ne of the primary purposes of [the bankruptcy acts]"); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) ("Our decisions lay great stress upon this feature of the law - as one not only of private but of great public interest in

that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.").

Conversely, the Court has also reiterated time and again that bankruptcy relief is also properly *limited* to debtors who are actually honest, and that the bankruptcy laws should be construed accordingly. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("[I]n the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor'" and stating that, regarding provisions governing the nondischargeability of certain debts, "[w]e think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud."); *Brown v. Felsen*, 442 U.S. 127, 128 (1979) (observing that "[b]y seeking discharge, however, respondent placed the rectitude of his prior dealings squarely in issue, for, as the Court has noted, the Act limits that opportunity to the 'honest but unfortunate debtor'"); *Tinker v. Colwell*, 193 U.S. 473, 488 (1904) ("We are not inclined to place such a narrow construction upon the language of the section. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged.").

In this case, the court of appeals was properly mindful of these guiding principles, and interpreted section 706(a) consistently with the "fundamental canon of the Bankruptcy Code: [that] a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code . . . ." Pet. App. 32 (citation omitted). The court also recognized that this fundamental policy finds expression in section 105(a) of the Code, stating:

> Whether or not the Bankruptcy Code § 105(a) anti-abuse provision alone would warrant the bankruptcy court's decision to deny Marrama a subsection 706(a) conversion, that provision indeed looms large in determining whether

> Congress envisioned that subsection 706(a) be construed as withholding all discretion where the bankruptcy court is confronted by a patently abusive motion to convert . . . .

Pet. App. 33.

In this case, the debtor engaged in a demonstrated pattern of bad faith conduct and abuse. Permitting him unfettered access to chapter 13 relief would simply have furthered his abusive scheme by disenfranchising the Trustee, who was hot on his trail. *See* 11 U.S.C. § 348(e) (providing that "[c]onversion of a case under section 706 . . . of this title terminates the service of any trustee . . . that is serving in the case before such conversion."). Denial of conversion was essential to promote the essential policy that bankruptcy relief is properly available only to debtors who are actually honest.

Marrama suggests that a countervailing policy warrants permitting him unfettered access to chapter 13 - that of affording him the opportunity to pay his debts through a chapter 13 repayment plan. Pet. Br. at 20; *see also* NACBA Br. at 23. But given Marrama's demonstrated pattern of concealing assets and thwarting creditor repayment, it is doubtful (at best) that conversion would have served this purpose. More important, because Marrama's conduct would have constituted grounds to reconvert his chapter 13 case back to chapter 7, the policy that he invokes would not have been assisted in any event.

As the Court has explained, the taint of misconduct and bad faith occurring at one phase of a bankruptcy case permeates the entirety of the case. *See Flershem*, 290 U.S. at 518-19 ("The fact that the [district court approved the proceeding] does not remove the taint of illegality. . . . Nor is it material that the corporation became insc ent later . . . . The lack of equity in the bill when filed is not cured by the insolvency later occurring."). And there is good reason for this view. Successful bankruptcy administration turns on the good faith of all parties to the proceeding, and where (as here) the debtor's good faith has once been shown to be seriously wanting, a court is justified in doubting whether the debtor will adhere to necessary procedures going forward and may,

if the transgression warrants it (as in this case), deny relief to which an honest debtor would undoubtedly be entitled.

E. Failure To Recognize The Bankruptcy Court's Inherent Authority To Deny Conversion In Cases Involving Bad Faith Or To Prevent Abuse Would Be Disastrous To The Administration Of Bankruptcy Cases.

Like any system of law, the chapter 7 process is susceptible to bad faith manipulation and abuse. An important safeguard to protect against misconduct is the office of the chapter 7 trustee. In this case, that office functioned as it should. The Trustee uncovered Marrama's transfers and disclosure discrepancies and began to take action to remedy them. In an effort to avoid the Trustee, Marrama sought to convert his chapter 7 case to a proceeding under chapter 13 because doing so would have immediately disenfranchised the Trustee. *See* 11 U.S.C. § 348(e) (providing that "[c]onversion of a case under section 706 . . . of this title terminates the service of any trustee . . . that is serving in the case before such conversion"). The bankruptcy court properly denied conversion to prevent this from occurring. Removing the bankruptcy court's discretion to take the action that it took would serve only to facilitate the misconduct that Marrama attempted here. This would obviously be disastrous for the administration of bankruptcy cases, particularly because, in many cases, creditors hold claims too small to justify their careful scrutiny of the process and reliance on the office of the trustee assumes paramount importance.

Marrama argues that, rather than deny conversion from chapter 7 to 13 under section 706(a) on grounds of bad faith, courts should postpone any good faith inquiry until much later in the process - specifically, the time the debtor proposes to confirm a chapter 13 plan. Marrama observes that one of the requirements of confirmation of a chapter 13 plan is that the plan has been proposed in good faith. 11 U.S.C. § 1325(a)(3) (requiring as a condition of confirmation of a chapter 13 plan that "the plan has been proposed in good faith"). Marrama contends that permitting denial of conversion from chapter 7 to 13 for bad faith would essentially predetermine an inquiry that Congress designated for

the chapter 13 plan confirmation process. Pet. Br. at 23-24; *see also* NACBA Br. at 15. This argument, however, fails.

To begin with, section 1325(a)(3) is directed only to the debtor's good faith in proposing a plan. It says nothing about good faith in commencing a bankruptcy case, or converting from chapter 7 to 13. Reference to section 1325(a)(3) is thus a classic example of an inadequate remedy to address bad faith or prevent abuse prior to the plan confirmation process.

More important, as the court of appeals explained, there is no point in putting off the inevitable and wasting judicial and other resources in the process. Pet. App. 39. Confronted with clear evidence of the debtor's bad faith, a court may take action, and need not wait for the bad faith to generate the additional burden of fruitless administrative deadweight.

F. Permitting Marrama To Convert His Chapter 7 Case To Chapter 13 Would Be Manifestly Inequitable.

In presenting his Motion to Convert to the bankruptcy court, Marrama did not seek relief with the requisite "clean hands" that a court of equity demands. Scrutinizing Marrama's conduct and motives carefully, the bankruptcy court concluded that Marrama should not be able to take advantage of the conversion process to oust the Trustee and retain his property. Conversely, permitting Marrama to convert his case would have been inequitable precisely because it would allow a perversion of Congress's equitable system of bankruptcy law.

There is no injustice in denying Marrama access to the procedures of the chapter 13 process. Because the Bankruptcy Code is an equitable regime, denying Marrama's Motion to Convert in this case was fully consistent with the equitable underpinnings of the statutory scheme.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court of appeals in this case.

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ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS, and MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTION PRESENTED

Does a bankruptcy court have the discretion to deny a debtor's motion to convert a bankruptcy case from chapter 7 to chapter 13 when the court finds that the debtor filed the bankruptcy petition and/or the motion to convert in bad faith?

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PRELIMINARY STATEMENT

This matter arises out of the chapter 7 bankruptcy case of Petitioner, Robert Louis Marrama ("Marrama" or the "Petitioner"). The United States Bankruptcy Court sustained the objections filed by Respondent, Mark G. DeGiacomo, trustee of the bankruptcy estate of Robert Louis Marrama ("DeGiacomo," "the Trustee" or the "Respondent"), and Citizens Bank of Massachusetts ("Citizens Bank") and denied the Petitioner's Verified Notice of Conversion to Chapter 13. The issue on appeal is whether 11 U.S.C § 706(a) allows the bankruptcy court to deny an individual chapter 7 debtor's request to convert his or her case to chapter 13.

STATEMENT OF THE CASE

A. The Bankruptcy Petition

On March 11, 2003, Marrama commenced his bankruptcy case by filing a petition for relief under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Petition Date"). On March 11, 2003, DeGiacomo was appointed as the interim chapter 7 Trustee of Marrama's bankruptcy estate. 11 U.S.C. § 701(a)(1).[1] The Bankruptcy Code provides that immediately upon the filing of the bankruptcy petition, a bankruptcy estate is formed which includes virtually all of the debtor's assets. 11 U.S.C. § 541(a). The duties of a chapter 7 bankruptcy trustee

[1] When the creditors' meeting held pursuant to 11 U.S.C. § 341 was concluded without a request for a trustee election, DeGiacomo became the permanent chapter 7 trustee of this bankruptcy estate. 11 U.S.C. § 702(d).

include investigating the financial affairs of the debtor, collecting property of the bankruptcy estate and reducing the property to currency for the benefit of the creditors of the bankruptcy estate. 11 U.S.C. § 704(a)(1) and (4). The trustee's investigation of the assets of a debtor's bankruptcy estate generally commences with the trustee's review of the debtor's bankruptcy petition. The bankruptcy petition includes certain form schedules and a statement of financial affairs, all of which the debtor is required to complete and file with the Bankruptcy Court. 11 U.S.C. § 521; Fed. R. Bankr. P. 1007. Schedule A to a debtor's bankruptcy petition requires that the debtor list any interest that he or she may have in real property. SJA 4.[2] Schedule B to a debtor's bankruptcy petition requires that the debtor list any interest the debtor may have in personal property. SJA 5-6. Schedule C to a debtor's bankruptcy petition requires that the debtor list all property he or she wishes to exempt from the bankruptcy estate. SJA 7, 11 U.S.C. § 522. The statement of financial affairs is comprised of a series of questions to be answered by the debtor which are meant to elicit information that may be helpful to the trustee in connection with the recovery of assets for the bankruptcy estate. SJA 21-27.

A debtor is required to sign his or her schedules, statement of financial affairs and the bankruptcy petition as a whole under the penalty of perjury. SJA 2, 20 and 27.[3]

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[2] "JA" refers to the Joint Appendix. "SJA" refers to the Supplemental Joint Appendix.

[3] The statement signed in connection with the bankruptcy petition as a whole reads as follows: "I declare under penalty of perjury that the information provided in this petition is true and correct." SJA 2.

(Continued on following page)

Question 18 on Schedule B to a debtor's bankruptcy petition requires that the debtor list all property described as follows: "Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property." SJA 6.

Marrama answered Question 18 as follows: "Debtor is 100% beneficiary of Bo-Mar Realty Trust the res of which is real property in Maine in which the debtor intends to live. The Trust is a spendthrift trust." *Id.*

Also, in response to Question 18, Marrama listed the value of his interest in the Bo-Mar Realty Trust as "0". *Id.*

On Schedule C to his bankruptcy petition, Marrama included the following statement: "The beneficial interest in Bo-Mar Realty Trust is not property of the estate pursuant to 11 U.S.C. § 541(c)." SJA 7.

Question 10 on the Statement of Financial Affairs asks debtors to: "List all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." SJA 23.

The statement signed in connection with the schedules to the bankruptcy petition reads as follows: "I declare under the penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief." SJA 20.

The statement signed in connection with the statement of financial affairs reads as follows: "I declare under the penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." SJA 27.

Marrama's response to Question 10 was: "None." *Id.*

Question 17 on Schedule B to a Bankruptcy Petition directs the debtor to: "Identify other liquidated debts owing debtor, including tax refunds." SJA 6.

Marrama's response to Question 17 on Schedule B was: "None." *Id.*

B. The Creditor's Meeting

Immediately upon the filing of a chapter 7 bankruptcy petition, the Bankruptcy Code requires that a meeting of creditors be scheduled that is presided over by the interim trustee, 11 U.S.C. §§ 341 and 343; Fed. R. Bankr. P. 2003. Notice of the date, time and place of the creditors' meeting is given to all parties in the bankruptcy case. Fed. R. Bankr. P. 2002. At the commencement of the creditors' meeting, the bankruptcy trustee administers an oath to the debtor after which the debtor is questioned by the trustee concerning the debtor's assets and liabilities. Generally, the trustee also offers creditors the opportunity to ask questions of the debtor. The questions asked by the trustee usually track the debtor's schedules and statement of financial affairs which are reviewed by the trustee prior to and during the creditors' meeting. If, after asking these questions and allowing any creditors to ask questions, the trustee is satisfied that he has no other questions and does not require any additional documentation, the trustee will conclude the meeting. If, on the other hand, the trustee feels that there are additional questions which need to be asked of the debtor and/or additional documentation which the debtor needs to produce to the trustee, the creditor's meeting is continued on the record usually to a specific date and time. Creditors' meetings are electronically

recorded, and the recordings are maintained by the office of the United States Trustee.

The first session of Marrama's creditors' meeting was held on April 24, 2003 (the "Creditors' Meeting"). JA 36a. Although the sworn responses given by Marrama to questions contained in the schedules and statement of financial affairs indicated that Marrama's interest in the Bo-Mar Realty Trust had no value and, in any event, was not property of the estate, DeGiacomo asked many questions concerning this asset. JA 40a, 63a, 75a. Based on Marrama's answers to DeGiacomo's questions and the documents obtained by DeGiacomo, it was determined that: (a) in 1998, Marrama purchased certain real estate known and numbered as 10 Norton Avenue, York, Maine (the "Maine Property") for a total purchase price of $40,000.00 (the "Purchase Price"), JA 54a-55a; (b) Marrama paid the Purchase Price for the Maine Property by using $4,000.00 of his own funds as a down payment and by executing a $36,000.00 promissory note in favor of the seller of the Maine Property, which obligation was secured by a first mortgage on the Maine Property (the "Seller's Mortgage"), JA 55a; (c) subsequent to his purchase, Marrama paid for a substantial amount of work on the Maine Property, JA 56a; (d) on or about July 24, 2002, Marrama obtained a loan from Bank One, N.A. in the amount of $135,000.00 (the "Bank One Loan"), JA 56a-57a, and secured the obligation to repay the Bank One Loan by granting Bank One, N.A. a mortgage on the Maine Property (the "Bank One Mortgage"), JA 56a-57a; (e) after using the proceeds of the Bank One Loan to pay the balance due on the Seller's Mortgage, Marrama received net proceeds from the closing of the Bank One Mortgage in the amount of $118,100.40 (the "Net Proceeds"), JA 57a-58a; (f) Marrama

estimated that during the year prior to the Petition Date, the value of the Maine Property was approximately $220,000.00, JA 59a; (g) in August of 2002, approximately seven months prior to the Petition Date, Marrama transferred the Maine Property, for no consideration, to the Bo-Mar Realty Trust (the "Trust" and the "Transfer"); (h) the Declaration of Trust for the Trust indicates that Marrama is (i) the holder of 100% of the beneficial interest in the Trust, (ii) Josephine Bollettiero ("Bollettiero"), Marrama's girlfriend, was the sole trustee of the Trust, (iii) the Trust is revocable, JA 84a-87a; and (iv) the Maine Property was the only asset owned by the Trust, JA 53a. When DeGiacomo asked Marrama why he had transferred the Maine Property into the Trust, Marrama responded that the transfer was done "to try to protect it," JA 75a.

After eliciting this testimony from Marrama, DeGiacomo advised Marrama's counsel that he questioned the validity of the Trust. JA 59a. It is undisputed that immediately upon the conclusion of the first session of the Creditors' Meeting, DeGiacomo advised Marrama's attorney that DeGiacomo would be pursuing the recovery of the Maine Property for the bankruptcy estate. JA 15a and 30a.

C. Notice of Conversion

On June 23, 2003, Marrama filed a Verified Notice of Conversion to Chapter 13 (the "Verified Notice").[4] JA 1a and 11a. The Verified Notice did not disclose the reason Marrama wanted to convert his case to chapter 13. JA 11a.

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[4] Although this pleading was captioned as a "Notice," Fed. R. Bankr. P. 1017(f)(2) requires that requests for conversion pursuant to 11 U.S.C. § 706(a) must be made in the form of a motion.

On July 1, 2003, DeGiacomo filed the Chapter 7 Trustee's Opposition to Debtor's Verified Notice of Conversion to Chapter 13 (the "Trustee's Opposition"). JA 1a and 13a. On July 22, 2003, Citizens Bank filed Citizens Bank of Massachusetts' Opposition to Debtor's Verified Notice of Conversion to Chapter 13 (the "Citizens' Opposition"). JA 1a and 19a. The Trustee's Opposition argued that because Marrama had attempted to mislead the Trustee with the answers contained in his schedules and statement of financial affairs "the Debtor's request for conversion is made in bad faith, and conversion of the case would constitute an abuse of the bankruptcy process". JA 17a. Citizens' Opposition argued that Marrama's prepetition conduct concerning Citizens Bank's claim, as well as the misrepresentations concerning the Maine Property in the schedules and statement of financial affairs, constituted bad faith which should bar Marrama's efforts to convert his case to chapter 13. JA 19a-25a.

D. The Tax Refund

When asked during the Creditors' Meeting whether anyone owed him any money, Marrama's response was "no." JA 50a.

As stated earlier, Marrama responded "None" to Question 17 on Schedule B to the bankruptcy petition which asks the debtor to: "Identify other liquidated debts owing debtor, including tax refunds." SJA 6.

On or about August 20, 2003, approximately one week prior to the hearing, DeGiacomo's counsel was contacted by the Internal Revenue Service (the "IRS") and asked to whom the Debtor's tax refund check should be sent. JA 30a-31a. The IRS advised DeGiacomo's counsel that

Marrama had filed an amended tax return in July of 2002 in which Marrama asserted his right to a tax refund. JA 30a-31a. On September 5, 2003, DeGiacomo received a check from the IRS for Marrama's tax refund in the amount of $8,745.86 (the "Tax Refund"). *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 430 F.3d 474, 476 (1st Cir. 2005).

E. The Hearing

On August 27, 2003, United States Bankruptcy Judge William C. Hillman conducted a hearing concerning the Verified Notice and the Oppositions filed by DeGiacomo and Citizens Bank (the "Hearing"). During the Hearing, counsel to the Trustee advised Judge Hillman concerning Marrama's testimony at the Creditors' Meeting and the responses provided by Marrama in his schedules and statement of financial affairs. The Trustee's counsel argued that because of the misleading and false statements contained in those documents, Marrama should not be allowed to convert his case to chapter 13.[5] JA 29a-31a.

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[5] Subsequent to the Hearing, the Trustee's investigation exposed several other misstatements contained in Marrama's bankruptcy petition and statement of financial affairs. For example, Marrama:

1) failed to disclose, in response to Question 10 on the statement of financial affairs, the granting of the Bank One Mortgage on the Maine Property which occurred within a year of the Petition Date;

2) failed to disclose, in response to Question 10 on the statement of financial affairs, the transfer of $109,000.00 of the Net Proceeds to Bollettiero within a year of the Petition Date. *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 445 F.3d 518, 520 (1st Cir. 2006); *Citizens Bank of Massachusetts v. Marrama* (*In re Marrama*), 331 B.R. 10, 13 (D. Mass. 2005).

(Continued on following page)

Counsel to Citizens Bank advised Judge Hillman of actions taken by Marrama prior to the Petition Date with regard to Citizens Bank's claim and in connection with a Fed. R. Bankr. P. 2004 examination of Marrama. JA 31a-32a. The standing chapter 13 Trustee for the Eastern Division of the District of Massachusetts also addressed Judge Hillman and stated that, based on the facts presented, Marrama would not be able to propose a confirmable chapter 13 plan since he would be unable to satisfy the requirement that he pay, during the term of the chapter 13 plan, at least the full value of the non-exempt equity in his assets. JA 34a. During his argument to Judge Hillman, counsel to Marrama did not contest any of the relevant facts asserted by the opposing parties or the chapter 13 Trustee nor did he request an evidentiary hearing.[6] JA 33a. Rather, counsel to Marrama argued that the only reason Marrama had filed his case under chapter

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3) failed to list Bank One as a creditor on Schedule F. SJA 12-15;

4) failed to list the monthly payments he was making on the Bank One Loan on his original Schedule J (indicating that the 'home mortgage' he was paying was for "Glouceter" [sic]). SJA 19. Only after the Trustee's Opposition was filed did Marrama file an amended Schedule J which listed the Bank One Loan payment under "other." SJA 31; and

5) failed to list the Maine Property as his current address although he later testified, and stated in the brief he filed with this Court, that he was living there as of the Petition Date. SJA 1, JA 71a.

Any of these disclosures would have risked encouraging questioning by the Trustee about the Maine Property.

[6] Counsel to Marrama did contest the assertion that Marrama was receiving rental income on the Petition Date. This was a minor point that was mentioned by counsel to the Trustee during oral argument.

7 rather than a chapter 13 was that he was unemployed on the Petition Date. Counsel stated that since Marrama had recently found employment, he was now ready to proceed under chapter 13.[7] Counsel to Marrama indicated that the failure to disclose the transfer of the Maine Property in response to Question 10 on the statement of financial affairs was a "scrivener's error." JA 33a. No justification was offered concerning the statements contained in Schedule B or C about the Trust. Finally, with regard to the Tax Refund, Marrama's counsel told Judge Hillman that he and Marrama found out about it "about the same time as the trustee did." *Id.* Counsel to Marrama did not attempt to reconcile this statement with the fact that the reason this refund was being paid was the fact that Marrama had applied for it in July of 2002. JA 30a-31a.

After hearing from counsel to all parties as well as the standing chapter 13 trustee, Judge Hillman read into the record his findings of fact and ruling of law. Fed. R. Bankr. P. 7052. Judge Hillman ruled that "I don't think there's an 'Oops' defense to the concealment of assets." He concluded that "this is a bad faith case" and denied Marrama's request for conversion to chapter 13. JA at 34a-35a.

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[7] Although counsel to the Petitioner continues to repeat his contention that the desire to convert to chapter 13 was due to the fact that the Debtor obtained employment after the Petition Date from his brother's company and therefore could afford to make payments under a chapter 13 plan, the Petitioner's *original* Schedule I indicates that as of the Petition Date, he was employed by his brother's company, Capital Carpet & Flooring, just as he was when the amended schedules were filed. SJA 18 and 30.

F. The Bankruptcy Appellate Panel's Ruling

On appeal, the United States Bankruptcy Appellate Panel for the First Circuit affirmed Judge Hillman's ruling. *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 313 B.R. 525 (B.A.P. 1st Cir. 2004). After reviewing the language contained in § 706(a) of the Bankruptcy Code, its legislative history and previous decisions that it and other courts had rendered, the panel found that:

> [T]he plain language of § 706(a), when read together with other sections of the bankruptcy code and rules, does not grant a debtor an absolute right to convert a case from Chapter 7 to Chapter 13; rather, the right to convert is presumptive and should be granted unless there are extreme circumstances showing that the debtor is abusing the jurisdiction of the Bankruptcy Court.

Id., 313 B.R. at 532-533. The panel went on to find that one important factor when determining whether extreme circumstances exist is "whether a debtor intentionally attempted to conceal assets from creditors." *Id.* The panel then applied the extreme circumstances standard to the facts in the Marrama case and found that there was:

> . . . a pattern of attempts to conceal assets – the pattern that began before the debtor filed his petition when he transferred the Maine Property for no consideration to the trust, and continued post-petition until the Chapter 7 trustee threatened action to recover the Maine Property. As has been stated by the United States Supreme Court, the opportunity provided by the bankruptcy law for a 'fresh start' is limited to the 'honest but unfortunate debtor.'

Id., 313 B.R. at 535 (*citing Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). The panel found that "because of the existence of extreme circumstances" constituting bad faith, Judge Hillman's decision should be affirmed. *Id.*

G. The Decision of the First Circuit Court of Appeals

On further appeal, a panel of the First Circuit unanimously affirmed the decision of the Bankruptcy Court. *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 430 F.3d 474 (1st Cir. 2005). The panel indicated that its examination of the plain language of § 706(a) led them to conclude that "we can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceeding." *Id.*, 430 F.3d at 478. The court found that the words "may convert" reasonably could suggest "that the right to convert is merely presumptive and may be exercised only if the debtor meets the pre-conditions of eligibility established in Bankruptcy Code § 109(e) or even then only in the absence of other exceptional circumstances." *Id.* The court found compelling the fact that § 1307(b) contains a much stronger dictate that "the court shall dismiss" a case upon the request of a debtor. *Id.* The court cited to its previous case of *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 346 (1st Cir. 2004) where it stated that "Congress' use of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight." *Marrama*, 430 F.3d at 478. Although the court found that the plain language of § 706(a) did not create an absolute right of a debtor to convert his or her case to chapter 13, it also

examined the statute's legislative history. While the court stated that "the term 'absolute' is problematic if taken out of context in that it implies that the debtor's conversion right is unconditional" it found that "in context, the term 'absolute' likely constitutes a recognition either that the debtor may convert once as a matter of right or may not engage in successive conversions or that the debtor's right to convert cannot be waived by contract." *Id.*, 430 F.3d at 480. After finding that "nothing in the legislative history remotely negates or undermines the principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code," the court concluded that § 706(a) "permits the bankruptcy court to deny a chapter 7 debtor's subsection 706(a) motion to convert where the court determines that the debtor engaged in bad faith conduct." *Id.* After finding that the bankruptcy court's determination that Marrama engaged in bad faith conduct was amply supported by the record, the panel unanimously affirmed the lower court's ruling.

SUMMARY OF ARGUMENT

The bankruptcy schedules and statement of financial affairs filed by the Petitioner when he commenced his chapter 7 case contained several false statements concerning the Petitioner's real estate in Maine and his anticipated tax refund. When these assets were discovered by the Trustee, the Petitioner sought to halt the Trustee's liquidation efforts by converting his case to chapter 13. The Petitioner's attempt to convert was properly rejected by the bankruptcy court.

The plain meaning of § 706(a), including the use of the phrase "the debtor may convert," can be determined by reviewing "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Once these factors are considered, it becomes clear that the plain text of § 706(a) permits the bankruptcy court to review motions to convert filed pursuant to that subsection of the Bankruptcy Code. The Federal Rules of Bankruptcy Procedure, especially Rule 1017(f)(2), support the conclusion that Congress intended bankruptcy courts to have the discretion to allow or deny § 706(a) motions.

Nothing in the legislative history of § 706(a) contradicts the Respondent's position concerning the plain meaning of § 706(a). In fact, the legislative history for this subsection of the Bankruptcy Code, even if relevant, is of no help when trying to determine Congress' intent. The word "absolute" as used in the legislative history is susceptible to more than one meaning and the legislative history as a whole contains an incorrect description of § 706(a). (*See* discussion in Section II, *infra*)

The policy objectives of the bankruptcy laws strongly support the Respondent's position. Bankruptcy laws exist for the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-7 (1991). If the Petitioner's position is correct, a dishonest debtor would be able to manipulate the system by converting his or her case if undisclosed assets were discovered by the chapter 7 trustee. Also, if the Petitioner's position is correct, dishonest debtors would be encouraged to not disclose assets when they file a chapter 7 case since the relatively safe harbor of a chapter 13 would always be available. The policy underlying the bankruptcy

code strongly supports the Respondent's position that the bankruptcy court may review § 706(a) motions for bad faith.

The decision issued by the First Circuit Court of Appeals should be affirmed.

ARGUMENT

I. The Plain Meaning of 11 U.S.C. § 706(a) Provides the Bankruptcy Court with Discretion to Deny a Debtor's Motion to Convert a Case From Chapter 7 to Chapter 13.

When construing the provisions of a statute, it is the duty of the judiciary to effectuate the intent of Congress. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993), (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (superseded by statute on other grounds). To ascertain Congressional intent, courts must first look at the language of the statute to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (*citing United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). Courts must review a statute with the understanding that Congress "says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). In the absence of express legislative history to the contrary, further inquiry is prohibited "if the statutory language is unambiguous and the statutory scheme is

coherent and consistent." *Id.* (*quoting Ron Pair Enters., Inc.*, 489 U.S. at 240); *accord Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

A. The Use of the Word "May" in § 706(a) Indicates that Congress Intended to Provide Bankruptcy Courts with the Discretion to Deny a Debtor's Motion to Convert.

To determine whether the statutory language is plain and unambiguous, courts may consider three factors: "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341 (*citing Cowart*, 505 U.S. at 477; *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

11 U.S.C. § 706(a) provides:

> the debtor may convert a case under this chapter [Chapter 7] to a case under chapter 11, 12 or 13 of this title at any time, if the case has not been converted under §§ 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

The Petitioner argues that the plain language of § 706(a) provides a debtor with an absolute right to convert a case to chapter 7. Since this right is absolute, the Petitioner argues, bankruptcy courts lack discretion to deny a request for conversion regardless of the underlying

circumstances that motivated the filing of the bankruptcy petition or the request to convert.[8] However, the plain language of § 706(a) is at odds with the Petitioner's view. That language does not include the phrase "absolute right." Although that phrase is found in the legislative history (*see* discussion in Section II, *infra*), a mechanical use of legislative history may not be substituted for a mechanical use of statutory language. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981).

Congress' use of the word "may" merely indicates that the debtor is the only party who "may" seek to convert his or her case to chapter 12 or chapter 13.[9] In addition to indicating who may file a § 706(a) motion, Congress' choice of the word "may" in § 706(a) as opposed to the word "shall," clearly demonstrates an intent to afford discretion to bankruptcy courts with respect to the Debtor's ability to convert a case to chapter 7, not eliminate the court from the process. The definition of "may" and this Court's frequent construction of the usage of "may" in statutory provisions makes clear that "may" is used to connote discretion. *See* Black's Law Dictionary 993 (7th ed. 1999) ("Is permitted to . . . " or "Has a possibility (to)"); *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005) (holding

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[8] Petitioner's position, as summarized in the brief of Amicus Curiae, National Association of Consumer Bankruptcy Attorneys, is that "the plain language of 11 U.S.C. § 706(a) grants the debtor an unqualified one-time right to convert a chapter 7 bankruptcy case to chapter 13." As a preliminary matter, there can be no dispute that this position is incorrect at least to the extent of the "qualification" found in § 706(d) that the debtor must be eligible to be a chapter 13 debtor in accordance with § 109(e).

[9] *Compare* § 706(b) which allows 'parties in interest' to seek conversions to chapter 11.

that Congress' use of "may" in § 1447(c) rather than "shall" or "should" showed a grant of discretion); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) (finding that the use of the word "may" in the attorney's fees provision of the Copyright Act indicated discretion and therefore did not require courts to award attorney's fees to the prevailing party); *Terre Haute & Indianapolis R.R. Co. v. Indiana*, 194 U.S. 579, 589 (1904) ("The word 'may,' it is agreed, is permissive, not mandatory."). The construction of "may" as either conferring or confirming a degree of equitable discretion "conforms to the even more important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." *United States v. Rodgers*, 461 U.S. 677, 708 (1983).

Conversely, when Congress has sought to remove discretion from courts, it has readily used the word "shall" to express its intent. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (use of "shall" indicates "the language of command," and leaves no room for the exercise of discretion by the trial court) (*citing Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). Section 706(a) plainly states that "[t]he debtor *may* convert a case. . . ." If Congress had intended to strip the bankruptcy court of any role in a § 706(a) conversion it would have used language such as "the debtor shall be entitled to convert. . . ."

B. A Comparison of the Language Used in § 706(a) with the Language in Other Sections of the Bankruptcy Code Demonstrates that the Bankruptcy Court Has the Ability to Deny a Debtor's Request for Conversion.

To assist a court in determining the plain meaning of a statute, courts may also consult other provisions in the same statute. *See, e.g., S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1852 (2006), (*citing Bates v. United States*, 522 U.S. 23, 29-30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion")); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (" . . . there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.")

A review of the structure and text of other, similar sections of the Bankruptcy Code reveals that when Congress wanted to require an action by the bankruptcy court, it had no problem so stating. The fact that Congress used the word "may" when it intended to provide the court with discretion and used "shall" when it chose to direct courts to act is demonstrated by the first two subsections of §§ 1208 and 1307.[10] In these sections, Congress used the

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[10] Section 1208 (a) and (b) read:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(Continued on following page)

words "may" and "shall" in adjacent subsections. Sections 1208(a) and 1307(a) which contain language nearly identical to § 706(a) – provide that the debtor "may" convert a chapter 12 or chapter 13 case to chapter 7 at any time. In contrast, §§ 1208(b) and 1307(b) provide that upon the debtor's request, the court "shall" dismiss a case. The interplay of "may" and "shall" in §§ 1208 and 1307 makes clear that when Congress intended to assert a mandatory directive, it did so by using plain language such as "shall."

Also, when the powers granted to the court by § 1307(c)[11] are considered, it is only logical that Congress

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(b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Section 1307 (a) and (b) read:

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

[11] Section 1307(c) provides:

Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including –

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(Continued on following page)

intended to give bankruptcy courts the ability to deny § 706(a) motions when bad faith actions are uncovered. There is no question that a bankruptcy court can convert a chapter 13 case to chapter 7, or dismiss the case, if the court finds the debtor has acted in bad faith. Since a bankruptcy court, *during* a chapter 13 case, may dismiss

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(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521;

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521; or

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

or convert to chapter 7 if it determines that the debtor has acted in bad faith, it would be illogical to think that the same court, having found bad faith conduct, would be prohibited from stopping the commencement of a chapter 13 case in the first place. *See* 11 U.S.C. § 1307(c); *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999) (finding that a court may dismiss a chapter 13 case for lack of good faith).

As the foregoing analysis shows, unless a statute specifically directs the court to grant the request of a party, the court is entitled to evaluate whether such request should be granted. Because § 706(a) lacks the mandatory indicia that binds the court in other sections of the Bankruptcy Code, the plain language of § 706(a) provides discretion for a court to deny a debtor's motion to convert.

C. The Requirement that a Debtor Must Request Conversion by Filing a Motion Pursuant to Fed. R. Bankr. P. 1017(f)(2) Demonstrates that a Court Has Discretion to Allow or Deny a Motion for Conversion.

The fact that the plain text of § 706(a) provides only that a debtor *may* request that the bankruptcy court convert his or her case is made clear by referring to the Federal Rules of Bankruptcy Procedure. Rule 1017(f) of the Federal Rules of Bankruptcy Procedure, as applicable to this case, became effective on December 1, 1999.[12] When read together with other sections of the Bankruptcy Code

[12] This Court ordered that the 1999 Amendments (in which Rule 1017(f) was added) should take effect on December 1, 1999. Because Congress neither disapproved nor amended the amendments, the 1999 amendments went into effect on December 1, 1999.

and with Federal Rules of Bankruptcy Procedure, this rule supports the Respondents' position that the "may" in § 706(a) means that the debtor may request conversion by filing a motion which will be reviewed by the bankruptcy court.

If the Petitioner is correct in its assertion that a debtor's right to convert is "absolute," then the debtor should only need to file a "notice" of conversion, not a motion. However, Rule 1017(f)(2) expressly requires the filing of a motion by a debtor who seeks conversion pursuant to § 706(a). Rule 1017(f)(2) provides: "[c]onversion or dismissal under § 706(a) . . . shall be on motion filed and served as required by Rule 9013."[13] After the filing of a motion pursuant to § 706(a), twenty days notice of the hearing concerning the motion must be given to the trustee and all creditors. Fed. R. Bankr. P. 2002(a)(4).[14]

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[13] Rule 9013 provides:

> A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee of debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

[14] Rule 2002(a)(4) provides in part:

> (a) Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of . . .
>
> (4) in a chapter 7 liquidation case . . . the hearing on the dismissal of the case or the conversion of the case to another chapter. . . .

However, all requests by debtors to convert or dismiss their cases need to be sought through the filing of a motion. A debtor who wishes to convert his or her reorganization case *from* chapters 12 or 13 *to* chapter 7 may do so by filing a notice.[15] No court action is involved in order to convert the case.

Rule 1017(f)(3) provides:

> A chapter 12 or chapter 13 case shall be converted *without court order* when the debtor files a *notice* of conversion under §§ 1208(a) or 1307(a). The filing of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. . . . (emphasis added)

It has been argued that the requirement that a debtor file a motion and provide notice of the hearing, when he or she seeks conversion pursuant to § 706(a), is merely meant to give the court an opportunity to ensure that the restrictions provided in § 706(a) (no previous conversion) and § 706(d) (debtor is eligible to be a chapter 13 debtor) are met. *Marrama*, 430 F.3d 474, 479 n. 4. However, the restriction found in § 706(d) is also found in §§ 1208(e) and 1307(g)[16]

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[15] Since an individual debtor cannot be forced into chapter 12 or chapter 13, a chapter 12 or 13 debtor cannot be forced to stay in either of these chapters. *Toibb v. Radloff*, 501 U.S. 157, 165-166 (1991) (noting Congress' concern about an involuntary chapter 13 being a violation of the involuntary servitude prohibition of the Thirteenth Amendment); *In re Molina Y Vedia*, 150 B.R. 393, 399 (Bankr. S.D. Tex. 1992) (discussing the right of chapter 12 and chapter 13 debtors to dismiss their case in view of the Thirteenth Amendment to the United States Constitution).

[16] Sections 1208(e) and 1307(g), as of the effective date of the Bankruptcy Reform and Consumer Protection Act of 2005, provide: "Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

and yet, as previously stated, conversions pursuant to §§ 1208(a) and 1307(a) are accomplished by the mere filing of a notice. Fed. R. Bankr. P. 1017(f)(3). Additionally, there is no reason to conduct a hearing merely to confirm that a debtor's case previously had not been converted and that the debtor had met the eligibility requirements because a review of the docket would indicate whether there had been previous conversions and a check of the schedules filed by the debtor would confirm whether or not the debtor met the eligibility requirements set forth in § 109(e).

D. The Arguments Presented by Amicus Curiae National Association of Consumer Bankruptcy Attorneys Concerning the Interaction between Subsections of § 706, other sections of the Bankruptcy Code and the Rules of Bankruptcy Procedure are Flawed.

Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys ("NACBA"), argues that if Congress had intended to give the bankruptcy court a role in § 706(a) conversions, it could have included the same "the court may convert" language that is found in § 706(b)[17]. *See* NACBA Br. at 11. This argument is flawed for several reasons. First, it overlooks a fundamental distinction between the purposes underlying those two sections. Section 706(a) sets forth the requirements for a *debtor's voluntary* request to convert under § 706(a), whereas

[17] Section 706(b) provides: "On hearing of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."

§ 706(b) discusses the requirements for a *non-debtor's* request to *involuntarily* convert a debtor's case. However, as recognized by Fed. R. Bankr. P. 1017(f), neither section prohibits the bankruptcy court from reviewing the request for conversion. Rule 1017(f)(2) provides that a debtor's request to convert a case under § 706(a) is brought pursuant to the motion procedure provided in Rule 9013, while Rule 1017(f)(1) provides that a motion to involuntarily convert a case under § 706(a) is brought as a contested matter under Rule 9014. Motions are also required for requests to convert or dismiss under sections 1112(b), 1208(c) and 1307(c). Even though a debtor's request for conversion under § 706(a) is not treated initially as a contested matter – likely because most requests for conversions will not involve dishonest debtors – the debtor must nevertheless file a motion to convert and "state with particularity the grounds" for the requested relief. Fed. R. Bankr. P. 9013.

NACBA's argument also ignores the import of § 706(c), which provides that: "*[t]he court may not* convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion" (emphasis added). Since § 706(c) provides that the court "may not" convert a chapter 7 case to chapter 12 or 13 unless the debtor "requests such conversion," and the only way a debtor can "request[] such conversion" is by filing a § 706(a) motion, § 706(c) reinforces the fact that the court retains the discretion to decide a § 706(a) motion for conversion that is made by the debtor.

NACBA's contention that the alternative phrasings of § 706(a) "the debtor may convert" and § 1307(b), "the court shall [convert] . . . " is a "distinction without a difference" ignores the plain meaning of both statutes. *See* NACBA

Br. at p. 12. Canons of statutory construction make clear that when "may" and "shall" both appear in a statutory provision, the general inference is that each is used in its usual sense, the one act being permissive, the other mandatory. *Anderson*, *supra*, 329 U.S. at 485. In such instances, a court should not conclude that Congress intended "may" to provide a mandatory directive. *See Martin*, 126 S. Ct. at 709; *see, e.g.*, *Farmers & Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649, 663 (1923) (concluding that the careful use of "may" in certain sections of the Federal Reserve Act and "shall" in other sections did not permit "may" to be construed as "shall"). The careful use of "may" in § 1307(a) and "shall" § 1307(b) makes clear that Congress intended to differentiate the discretion afforded to courts for conversions and dismissals. Congress' use of "may" in § 1307(a) and its identical counterpart § 706(a) demonstrates that Congress intended to provide the bankruptcy court with greater discretion in deciding requests for conversion.

Although NACBA argues that the plain meaning of § 706(a) supports its position, it looks to the legislative history of §§ 1307(a) and 1307(b) to support its position. The legislative history for §§ 1307(a) and 1307(b) provides that: "[s]ubsections (a) and (b) confirm, without qualification, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed." This statement is simply incorrect. Just as a conversion pursuant to § 706(a) is subject to qualifications concerning previous conversions and eligibility, there is no dispute that a debtor's right to convert pursuant to § 1307(a) is also not "without qualification." At the very least, to qualify for conversion under either section, a debtor must

first demonstrate his or her eligibility under the chapter to which he or she is seeking to convert.

E. The Canon of Expressio Unius Is Not Applicable to § 706.

In its brief, the NACBA asserts that § 706 provides two limitations on the debtor's right to convert: (i) the case must not previously have been converted and (ii) the debtor must be eligible for a new chapter. NACBA argues that the doctrine of *expressio unius* prevents the application of any other "unexpressed" or "unwritten" limitations. *See* NACBA Br. at p. 13. However, the NACBA has misinterpreted § 706 and the application of the *expressio unius* doctrine.

As suggested by the cases cited by the NACBA, the doctrine of *expressio unius* is applicable only when a statute *lists* explicit exceptions to a general rule. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616 (1980). The statute at issue in the *Andrus* case specifically listed certain exceptions.[18] *Id.* Similarly, this Court in *Toibb v. Radloff* focused on the specific language of § 109(d) which provides a list of who can be a chapter 11 or chapter 7 debtor: "Only a person that may be a debtor under chapter

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[18] "Title 41 U.S.C. § 252(e) (subsection (e)) states that § 252(c) 'shall not be construed to . . . permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising . . . , unless . . . negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12) or (14) of subsection (c) of this section." *Id.*

7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title" and § 109(b) which states: "A person may be a debtor under chapter 7 of this title only if such person is not – (1) a railroad; (2) a domestic insurance company, bank, . . . ; or (3) a foreign insurance company, bank, . . . engaged in such business in the United States." *Id.*, 501 U.S. 157, 161 (1991).

As this Court has indicated, the doctrine of *expressio unius* is applicable only when specific limitations are listed in the relevant statute. *See Andrus*, 446 U.S. at 616. Section 706, however, does not contain an explicit list of exceptions. In fact, the language of § 706 focuses on the rules governing different parties' rights with respect to conversion. Specifically, § 706(a) governs when a *debtor* may file a motion to convert his case, § 706(b)[19] governs when a *party in interest* may file a motion to convert a case and §§ 706(c) and (d)[20] govern when the *court* may not convert a case. Nothing in the statute sets forth or lists exclusive exceptions concerning when a debtor may

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[19] Section 706(b) provides: "On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."

[20] Section 706(c) provides: "The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion."

Section 706(d) provides:

> Section 706(d) provides: Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

convert his or her case from chapter 7. Further, the limitation set forth in § 706(a) ("if the case has not been [previously] converted") is simply a limitation on when a debtor may file a motion to convert a case, not a limitation on the bankruptcy court's ability to take action on the motion.

II. Nothing in the Legislative History of § 706(a) Indicates that Congress Intended to Deprive Courts of the Ability to Deny Motions to Convert in Extreme Circumstances.

Notwithstanding the plain language of § 706(a), the Petitioner urges this Court to construe the discretionary "may" as the mandatory "shall," because the word "absolute" appears in the legislative history of § 706(a). Like the Petitioner, nearly every court that has determined that bankruptcy courts lack discretion to deny a § 706(a) request has relied heavily upon the legislative history of § 706(a). *See, e.g., In re Martin*, 880 F.2d 857, 858 (5th Cir. 1989) (legislative history makes clear Congress' intent to give the debtor an absolute one-time right to convert); *In re Carrow*, 315 B.R. 8, 14 (Bankr. D.N.Y. 2004) ("[i]n determining whether § 706, as a whole, confers an absolute right of conversion upon the debtor, courts are guided by the . . . legislative history . . . "); *In re Widdicombe*, 269 B.R. 803, 807 (Bankr. D. Ark. 2001) (" . . . the legislative history indicates that § 706(a) gives the debtor one absolute right of conversion of a liquidation case to a reorganization or individual repayment case").

As a threshold matter, if the language of a statute is plain and unambiguous, courts need not resort to the legislative history to construe the statute, *TVA v. Hill*, 437 U.S. 153, 184 n. 29 (1978). While legislative history may be instructive, courts have frequently expressed skepticism

about the usefulness of legislative history to show legislative intent, arguing that "it is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ('If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed'), because it becomes a crutch ('There's no need for us to vote on the amendment if we can write a little legislative history'), because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process)." *In re Sinclair*, 870 F.2d 1340, 1343-1344 (7th Cir. 1989), (*citing*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia, J., concurring)); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988); *Electrical Workers v. NLRB*, 814 F.2d 697, 712-15 (D.C. Cir. 1987), and *id.* at 715-20 (Buckley, J., concurring); *FEC v. Rose*, 806 F.2d 1081, 1089-90 (D.C. Cir. 1986); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring). "Courts should carefully scrutinize whether the legislative history evidences Congress' intent or is merely the expression of one person's personal viewpoint injected into the record in an effort to sway the courts in a manner that person was unable to persuade the legislature." *Steinle v. Boeing*, 785 F. Supp. 1434, 1439 (D. Kan. 1992). Ultimately, the court cannot substitute a mechanical use of legislative history for a mechanical use of statutory language. *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981). Rather, courts should approach legislative materials critically, keeping in mind that the intent of Congress

is sought, and that various legislative materials are only better, or worse, evidence of that intent. *Id.*

A quick reading of the legislative history of § 706(a) appears to suggest that the debtor's right to convert is "absolute."[21] This would be an incorrect conclusion since there is at least the additional condition contained in § 706(d). Furthermore, since the provision contained in § 706(a) that "the right to convert" cannot be waived is not mentioned in the legislative history, the First Circuit properly determined that the term "absolute" in the legislative history may mean only "that the debtor's right to conversion cannot be waived by contract." *Marrama v. Citizens Bank of Massachusetts* (*In re Marrama*), 430 F.3d 474, 480 (1st Cir. 2005).

As the foregoing demonstrates, since the legislative history of § 706(a) is not consistent with § 706 as a whole and the use of the word "absolute," when read in context, is susceptible to different interpretation, the legislative history provides no assistance when attempting to determine congressional intent.

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[21] The legislative history of § 706(a) reads:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R. Rep. No. 95-595, at 380 (1977); S. Rep. No. 95-989, at 94 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5880.

III. The Policy Objectives of the Bankruptcy Code are Consistent with the Determination that Congress Intended to Give Bankruptcy Courts Discretion when Considering a § 706(a) Motion to Convert.

Over ninety years ago, this Court articulated the policy objectives of this country's bankruptcy laws with regard to individual debtors as follows:

> [i]t is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then relieve *the honest debtor* from the weight of oppressive indebtedness, and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes.

Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549 (1915) (emphasis added).

More recently, this Court has reiterated this policy by stating that the opportunity provided by the bankruptcy law for a "fresh start" is limited to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-7 (1991) (" . . . a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a

completely unencumbered new beginning to the 'honest but unfortunate debtor.'" (internal citations omitted)).[22]

Courts have also readily acknowledged the equitable powers of the bankruptcy court to enforce the underlying policy objectives of the Bankruptcy Code. *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) ("[T]he Bankruptcy Code, both in general structure and in specific provisions, authorizes bankruptcy courts to prevent the use of the bankruptcy process to achieve illicit objectives. The right of debtors to a fresh start depends upon the honest and forthright invocation of the Code's protections.") "[B]ankruptcy courts have traditionally drawn upon their powers of equity to prevent abuse of the bankruptcy process and to ensure that a case be commenced in 'good faith' to reflect the intended policies of the Code." 2 L.

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[22] For similar statements by this Court concerning the policy behind the bankruptcy laws: *see Perry v. Commerce Loan Co.*, 383 U.S. 392, 396 (1966) ("[C]hapter XIII [of the former Bankruptcy Act (which provides relief to wage-earners)] provides a highly desirable method for dealing with the financial difficulties of individuals. It creates an equitable and feasible way for the honest and conscientious debtor to pay off his debts rather than having them discharged in bankruptcy."); *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 514 (1938) ("The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness and permitting him to start afresh."); *Continental Ill. Nat'l Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 670-71 (1935) (Relief for honest debtors was "[o]ne of the primary purposes of [the bankruptcy acts]"); *Stellwagen v. Clum*, 245 U.S. 605, (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor, . . . but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law – as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.").

King, Collier on Bankruptcy § 301.05[1], at 301-5 to 301-7 (1996). The First Circuit in *In re Tully* articulated the role of bankruptcy courts to prevent abuses as follows:

> [T]he very purpose of certain sections of the law . . . is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated, "the successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight. The bankruptcy judge must be deft and evenhanded in calibrating these scales.

Id., 818 F.2d 106, 110 (1st Cir. 1987) (internal citations omitted).

Principles concerning the protection of only the "honest but unfortunate debtor" remain the touchstone for decisions denying conversion for dishonest debtors. *See, e.g.*, *Neely v. Smith* (*In re Neely*), 334 B.R. 863, 871 (D. Tex. 2005); *Finney v. Smith*, 141 B.R. 94 (D. Va. 1992); *Darst v. Wampler* (*In re Wampler*), 302 B.R. 601, 605 (Bankr. D. Ind. 2003); *In re Brown*, 293 B.R. 865, 871 (Bankr. D. Mich. 2003); *In re Marcakis*, 254 B.R. 77, 81 (Bankr. D.N.Y. 2000). Yet the Petitioner and the NACBA argue that when Congress drafted § 706(a) it intended to allow dishonest debtors to force bankruptcy judges to allow them to convert their cases notwithstanding their motives for

filing and untruthful statements or omissions made in their bankruptcy papers. If the Petitioner's position is correct, then debtors and their counsel would be encouraged to try to hide assets from their chapter 7 trustee with the knowledge that if the chapter 7 trustee discovers the hidden asset, the debtor can simply convert to chapter 13 and get a new trustee.

The Petitioner's position – that § 706(a) provides a mandatory right to conversion – would require bankruptcy courts to ignore outright abuses of the Bankruptcy Code and leads to a perversion of the purpose and object underlying the Bankruptcy Code. The potential abuse that can ensue from an automatic conversion to chapter 7 is illustrated by the following hypothetical posited in *In re Kuhn*, 322 B.R. 377, 394 (Bankr. N.D. Ind. 2005).

> Let's posit a case in which a Chapter 7 debtor "inadvertently" omits property of significant value from the Chapter 7 schedules. By luck or fate or hard work – it's hard to tell the difference sometimes – the Chapter 7 trustee gets wise and finds the hidden asset(s) and begins the process of administering them in the case for the benefit of creditors. "OOPS," says the debtor, "I don't want to lose my $50,000 undisclosed bank account, what do I do?!!?" The wise Chapter 13 practitioner whom the debtor consults says – "Not a problem: you have the absolute right to convert to a Chapter 13 under 11 U.S.C. § 706(a), and that'll put an end to the nasty Chapter 7 trustee trying to glom onto that account. All you'll have to do is confirm a plan that satisfies 11 U.S.C. § 1325(a)(4) by taking the value of the account into account in your distribution to creditors, and then pay that value over 3-5 years in convenient monthly installments over the term of

> your plan." The debtor replies, "But what happens to the account?" The wily practitioner responds, "It's yours to do with as you will. Even if your Chapter 13 case is unsuccessful and even if the case is converted back to Chapter 7, only what's left of the account is there for the Chapter 7 trustee thanks to 11 U.S.C. § 348(f)(1)(A).[23] Hey, with the money in the account, while you're in Chapter 13, buy a couple of new cars with cash (make sure they're kind of moderately priced), buy new appliances, build that dormer extension to your house, go out to eat at Red Lobster every night, buy new clothes, send your kid to summer camp, etc., etc., etc. – no one's going to say then that you spent the money in bad faith, so 11 U.S.C. § 348(f)(2)[24] won't apply." "Wow, thanks," says the debtor, "you're really smart." The wily lawyer, humble and honest for once, replies, "Don't thank me. It's your absolute right to convert your Chapter 7 case to a case under Chapter 13. Nuts to the Chapter 7 trustee! Hah!!"

In re Kuhn, 322 B.R. 377, 394 (Bankr. N.D. Ind. 2005).

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[23] Section 348(f)(1)(A) provides that:

> (f)(1) Except as provided under paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title –
>
> > (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; . . .

[24] Section 348(f)(2), prior to its amendment in 2005, provided that: "If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion."

The foregoing example illustrates how an automatic right to conversion may actually *encourage* debtors not to disclose assets in hope that a chapter 7 trustee does not discover such assets. A dishonest debtor who faces no risk that his motion for conversion could be denied would likely choose to file a chapter 7 case first without disclosing valuable assets and convert to a chapter 13 case only if his improprieties are discovered by the trustee.

In addition to encouraging debtors to commit abuses prior to filing a bankruptcy petition, an automatic right to conversion may allow a dishonest debtor to manipulate the bankruptcy system during a chapter 7 filing when his bad faith becomes apparent. For example, in *In re Brown*, the debtor's chapter 7 petition listed his residence as his primary asset, the value of which was significantly understated in his bankruptcy schedules. 293 B.R. 865, 867 (Bankr. W.D. Mich. 2003). The debtor failed to appear and testify at several scheduled § 341 meetings. *Id.*, 293 B.R. at 868. When the chapter 7 trustee attempted to sell the property, the debtor refused to allow access to the broker or the potential buyer. *Id.* The debtor's failure to permit an inspection forced the trustee to accept a reduced price from the potential purchaser. *Id.* When the court approved the sale, the debtor moved to convert his case to chapter 13 prior to the closing. *Id.* The court in *Brown* denied the debtor's conversion on grounds of bad faith. *Id.*, 293 B.R. 871. The court found that since the debtor filed his petition, he had made constant attempts to avoid the consequences of a chapter 7 bankruptcy – namely, the sale of his property. *Id.* The bankruptcy court further determined that the debtor's motion to convert was simply the debtor's latest attempt to manipulate the bankruptcy process to prevent the sale of his property and that the "'absolute'

nature of the conversion right does not extend, however, to situations where conversion is sought as a means of thwarting the chapter 7 trustee's attempts to administer the bankruptcy estate or of escaping unintended consequences of a chapter 7 petition." *Id.*

Pursuant to § 348(e), conversion of a case terminates the service of any trustee that is serving on the case before such termination.[25] "At the moment the bankruptcy court grant[s] [the debtor's] motion to convert, the Chapter 7 trustee los[es] jurisdiction over the case. In effect, the trustee became just another creditor with standing to recover fees from the estate, but without standing to act on behalf of the estate, either to challenge the conversion or for any other purpose, including prosecuting or defending tort actions that belonged to the estate." *Cable v. Ivy Tech State College*, 200 F.3d 467, 474 (7th Cir. 1999) (internal citations omitted).

If converted, all property of a chapter 13 estate, including causes of action, vests in the debtor. The chapter 7 trustee's service is terminated, and the chapter 7 trustee no longer has standing to continue any litigation that had been commenced before conversion. *In re Grossot*, 205 B.R. 341, 343 (Bankr. D. Fla. 1997); *In re Rakosi*, 99 B.R. 47, 50 (Bankr. D. Cal. 1989).

There are several ways a dishonest debtor can exploit the chapter 7 trustee's loss of jurisdiction. One example involves the recovery of preferences:[26]

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[25] 11 U.S.C. § 348(e): Conversion of a case under section 716, 1112, 1208 or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

[26] *See* 11 U.S.C. § 547.

> A debtor makes a preferential transfer of $100,000 to his mother ten months before filing his bankruptcy petition. The chapter 7 trustee discovers this undisclosed asset and files an adversary complaint to avoid and recover the transfer. Once the complaint is filed, the debtor files a motion to convert his case to chapter 13.

As noted above, the debtor's conversion of the case would automatically terminate the service of the chapter 7 trustee, including the trustee's right to pursue recovery of the preferential transfer. *See Cable*, 200 F.3d at 474. In addition, as noted in *In re Ciavarella*, the debtor's conversion would also vest the right to pursue the complaint in the *debtor*, not the chapter 13 trustee. 28 B.R. 823, 826 (Bankr. D.N.Y. 1983). In *Ciavarella*, the court noted:

> [T]he Chapter 13 trustee does not possess the full panoply of weapons available to a trustee under either Chapter 7 or Chapter 11. As indicated earlier, the Chapter 13 trustee's functions are restricted under Code § 1302 to administrative matters. Indeed, there is some dispute even as to whether or not a Chapter 13 trustee has standing to seek the conversion of a Chapter 13 case to a liquidation case under Chapter 7. In [*In re Kutner*, 3 B.R. 422 (Bankr. N.D. Tx. 1980)], the court characterized the Chapter 13 trustee as "more of a hybrid ombudsman." [] . . . The Chapter 13 debtor alone controls whether or not he or she remains in Chapter 13 and how much of future income or earnings should be offered for distribution to the unsecured creditors via the "ombudsman" Chapter 13 trustee.

In re Ciavarella, 28 B.R. 823, 827 (Bankr. D.N.Y. 1983); *accord Freeman v. Eli Lilly Federal Credit Union* (*In re Freeman*), 72 B.R. 850, 854 (Bankr. E.D. Va. 1987) (" . . . the

Chapter 13 trustee's functions are restricted to essentially administrative matters. . . . His basic role is to review plans, advise the Court with respect to plans and act as a disbursing agent under confirmed plans. . . .") (internal citations omitted).[27]

The court in *Ciavarella* also explained the role of a chapter 13 debtor in recovering preferential transfers:

> Unlike a Chapter 11 case, where the debtor may commit pre-petition earnings and assets towards funding a plan of reorganization that must be accepted by the creditors, a Chapter 13 debtor's plan merely calls for the debtor to submit "all or such portion of *future earnings* or other *future income* of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." (Emphasis added.) *See* [11 U.S.C.] § 1322(a)(1). Thus, the debtor's past conduct, whether dischargeable or not under Chapter 7, and his prepetition income and assets are not material to the administration of a Chapter 13 case. The creditors are only entitled to share in the debtor's future income. *Even if preferences are recoverable in a Chapter 13 case, the creditors do not participate in the assets so recovered; their*

[27] Some courts have held that the chapter 13 trustee, not the debtor, retains the power to avoid preferential transfers. *See Miller v. Brotherhood Credit Union (In re Miller)*, 251 B.R. 770, 772 (Bankr. D. Mass. 2000); *Hill v. Fidelity Fin. Serv. (In re Hill)*, 152 B.R. 204, 206 (Bankr. S.D. Ohio 1993) ("plain meaning of the language in § 547 provides that the trustee is the only party who has the authority to avoid a preference under § 547."); *Pilgreen v. Brown & Williamson Fed. Credit Union (In re Pilgreen)*, 161 B.R. 552, 554 (Bank. M.D. Ga. 1989) (observing that the language of the Bankruptcy Code does not provide chapter 13 debtors with avoidance powers of a trustee).

> *share of the distribution is derived solely from the debtor's future income and earnings.*

Ciavarella, 28 B.R. at 826-827 (emphasis added). In jurisdictions that follow the reasoning in *Ciavarella*, a dishonest debtor could transfer significant assets to friends and family and omit such transfers from his bankruptcy petition. If the chapter 7 trustee discovers such transfers and seeks to avoid them, the debtor need only convert to chapter 13 to keep the transferred property from being included in the bankruptcy estate.

The foregoing scenario also demonstrates how allowing a dishonest debtor to convert a case automatically after his misdeeds have been unearthed by a chapter 7 trustee encourages the practice of "trustee shopping." When faced with a chapter 7 trustee who pursues undisclosed assets, the dishonest debtor can attempt to persuade the chapter 13 trustee that the undisclosed assets are not property of the bankruptcy estate. This is exactly what Marrama would have done if his case had been converted to chapter 13. In such an instance, the debtor has a second opportunity to escape the consequences of his initial bad faith.

Also, while it is true that a debtor who converts a chapter 7 case to chapter 13 may not automatically dismiss his case pursuant to § 1307(b), the practical realities of case administration can allow a dishonest debtor to cause his case to be dismissed without seeking leave from the court. The vast majority of chapter 13 plans are unsuccessful because debtors are unable to make their monthly payments to the chapter 13 trustees. When these monthly payments are missed, the chapter 13 trustees

routinely file motions to dismiss the bankruptcy case. Honest debtors, who feel they can catch up if given a chance, will file an objection to the motion to dismiss and seek a chance to become current with their payments. A dishonest debtor, who purposely fails to make the payments to trigger a motion to dismiss, will merely sit back and allow the case to be dismissed. Unless someone objects to the dismissal, the debtor will exit his bankruptcy and still retain all property without any adverse consequence. Of course, even if a debtor is forced to convert his case back to chapter 7, the bankruptcy estate could suffer unavoidable harm in the interim. Examples of such harm include potential squandering of assets by the debtor, as evidenced by *Kuhn*, or a significant devaluation of assets caused by the debtor's improper use or abuse of assets such as a vehicle or boat. Also, a potential purchaser of property may no longer be interested in buying the property after a re-conversion thus forcing the trustee to sell the property at a reduced price. Finally, if the debtor stops making payments on a secured loan, such as a mortgage or stops paying real estate taxes, the bankruptcy estate would realize less value for such property upon liquidation in the reconverted case.

All of the above examples are not far-fetched possibilities for a debtor who has already shown a proclivity towards manipulation and abuse of the Bankruptcy Code. To the extent a debtor is found to have engaged in bad faith, the bankruptcy court must be allowed to prevent that debtor from further abuses.

The Petitioner's construction of § 706(a) eviscerates the fundamental purpose underlying the Bankruptcy Code and allows dishonest debtors to escape the consequences of their dishonesty by allowing them to retain the same

property they attempted to hide from the trustee. Such an outcome could not have been a result Congress intended.

IV. Marrama's Due Process Rights Were Not Violated When the Bankruptcy Court Denied Conversion of His Case.

The Petitioner's brief contends, for the first time,[28] that his due process rights were violated when the bankruptcy court denied his request to convert his case. The Petitioner alleges that this violation occurred because the bankruptcy court made its ruling without the benefit of an evidentiary hearing.

It is uncontested that Marrama's counsel never asked the bankruptcy court for an evidentiary hearing. Even if such a request had been made, no further evidence was required in order for Judge Hillman to make his ruling. JA 34a-35a. There was no allegation that Marrama did not sign his bankruptcy papers under the pains and penalties of perjury stating that he had read them prior to signing. There is also no disagreement that certain statements contained in Marrama's bankruptcy papers were false.

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[28] Absent exceptional circumstances, the Court has consistently refused to review arguments which were neither raised nor addressed by courts below. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 39 (1989) ("Although 'we could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision,' 'where the ground presented here has not been raised below we exercise this authority "only in exceptional cases."'" (*quoting Heckler v. Campbell*, 461 U.S. 458, 468-469 n. 12 (1983)); *see, e.g., Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 319 n. 3 (1999) (refusing to address petitioner's argument concerning the applicability of state law in determining the availability of injunctions, when argument was neither raised nor considered below).

The Petitioner also contends that his due process rights were violated since Judge Hillman made his ruling prior to reviewing Marrama's chapter 13 plan which was not filed prior to the hearing.[29] The Petitioner's argument misses the point that the bankruptcy court's ruling was that the bankruptcy petition and the attempt to convert were the acts undertaken in bad faith. Whether the chapter 13 plan would have been (or could have been) filed in good faith was not the issue.

CONCLUSION

For the foregoing reasons, the decision below of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully aubmitted,

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[29] Fed. R. Bankr. P. 3015(b) provides that a chapter 13 plan "shall be filed within 15 days of conversion to chapter 13."

(13)

No. 05-996

Supreme Court
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IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS, and
MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF

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ARGUMENT

The language of section 706 of the Bankruptcy Code is unambiguous: "the debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under §§ 1112, 1208 or 1307 of this title. . . . Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." This language carries as clear a negative inference as any language can — there is no *other* basis for denying conversion.

Respondents and their *amici* invoke a much-exaggerated parade of "horribles" to illustrate why this Court should disregard the clear statutory meaning, and permit bankruptcy courts to deny conversion of a chapter 7 case to another chapter on the grounds of bad faith. Their reasoning, however, would have the *general* and *residual* authority granted in section 105(a) of the Bankruptcy Code trump the *specific* provisions of section 706(a). They do so in order to provide an *additional* remedy for the problem of the bad faith debtor—a problem that Congress expressly contemplated and addressed in other provisions of the Bankruptcy Code.

The truth of the matter is that the expansive, nearly limitless, authority that some bankruptcy courts believe that Congress conferred on them in section 105(a) of the Bankruptcy Code —a power to all but disregard the plain meaning of the Code when their own vision of "bankruptcy policy" runs contrary to what Congress has provided — is an important and recurring theme in bankruptcy appeals, and a matter that the courts of appeals have been required

to address with increasing frequency. A decision by this Court that broadly relies on the background section 105(a) power as a basis to disregard the plain language of the Code would reinforce the notion that bankruptcy judges are authorized to achieve whatever result they consider "equitable," notwithstanding clear and contrary statutory language.

That is not and should not be the law. In order to address the indisputably important problem of abuse by individual debtors, bankruptcy courts require no more authority than Congress actually granted them. While one could certainly imagine a Bankruptcy Code that *also* provided the specific judicially-created protections that were fashioned here, the task of so amending the Code is one that should be left to Congress.

I. THE "INHERENT AUTHORITY" OF A COURT DOES NOT PERMIT IT TO DISREGARD THE PROVISIONS OF STATUTES OR RULES.

Respondents and their *amici* rely largely on this Court's decision in Chambers v. NASCO, Inc., 501 US 32, in support of the proposition that a bankruptcy court has "inherent authority" to deny conversion, notwithstanding the clear language of 11 USC § 706.

In fact, Chambers strongly supports petitioner's position. Chambers involved a litigant who had not only filed pleadings that would have been subject to sanctions under Rule 11, he also engaged in "bad-faith conduct [that] was beyond the reach of the Rules." Id. at 50-51. In that circumstance — one in which "the conduct at issue is not covered by one of

the other sanctioning provisions," id. at 50 — a 5-4 majority of this Court, per Justice White, held that it was permissible to rely on the background inherent power. Four dissenting Justices, however, faulted the majority for its "failure to require reliance, when possible, on the panoply of express sanctioning provisions provided by Congress." Id. at 61 (Kennedy, J., joined by Rehnquist, C.J., and Souter, J., dissenting). *See also* Id. at 60 ("A court must use the prescribed means unless for some reason they are inadequate.") (Scalia, J., dissenting).

Chambers, at bottom, stands for the unremarkable principle that inherent power may *supplement* the powers afforded by statutes or rules when the statutes or rules are inadequate. "It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" Id., *quoting* Robinson, 19 Wall., at 511. Most tellingly, the Chambers court stated:

> A court must, of course, exercise caution in invoking its inherent power. . . . [W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power.

This Court's decision in Carlisle v. U.S., 517 U.S. 416 (1996), is to the same effect. The question in Carlisle was whether a district court could grant a defendant's motion for acquittal, notwithstanding that the motion was filed one day *after* the deadline for doing so as defined by Fed.R.Crim.Pro. 29. This Court held that it could not, and that the holding in

Chambers was of no help to the petitioner. "Whatever the scope of this 'inherent power,' however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." Nor did the background power reflected in the All Writs Act require a different outcome. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." Id. at 429. *See also* Br. of the United States in Carlisle v. United States, 1995 WL 728581 at * 31-32 ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.").

This Court has applied the same logic in the bankruptcy context. In Taylor v. Freeland and Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992), the Court held that the requirement of a timely objection to a debtor's claim of exemptions could not be altered by allegations of a debtor's bad faith in claiming the exemption, and that if bad faith was actually present, it could be remedied without violating the plain language of the Rule. Id. ("We have no authority to limit the application of §522(l)

to exemptions claimed in good faith."). The same principle controls here. The court's inherent power must be exercised with caution, discretion and restraint, and not in derogation of applicable statutes or rules.

II. SECTION 105 OF THE CODE CANNOT BE APPLIED IN THE MANNER PROPOSED BY THE RESPONDENTS.

The invocation of §105 adds nothing to the respondents' analysis. That provision was derived from the All Writs Act, 28 USC §1651, and as such is a residual source of supplemental authority, *see, e.g.*, In re Combustion Engineering, 391 F.3d 190, 225 & n.36 (3rd Cir. 2004); Palmer v. United States 219 F.3d 580, 582 n.2 (6th Cir. 2000), and by no means is an open-ended license to disregard the explicit command of a statute or rule. Accordingly, this Court has made clear that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 US 197 (1998).

If anything, a practical understanding of the issues commonly presented in bankruptcy litigation and bankruptcy appeals demonstrates that one important form of "abuse" of the bankruptcy process derives from the view that section 105 may authorize a bankruptcy court to enter any order or take any action that it believes will facilitate a corporate reorganization, without regard to the language of the Bankruptcy Code. For example:

- In In re Kmart Corp., 359 F.3d 866,871 (7th Cir. 2004), the bankruptcy court entered an order

authorizing the debtor to pay, immediately and in full, the claims of certain so-called critical vendors, notwithstanding the Code's specific (and contrary) rules about priority and distribution. The ostensible authority for this action was the "doctrine of necessity," a doctrine (not unlike the principle of preventing abuse invoked by respondents herein) that was said to be grounded in section 105. The Seventh Circuit reversed. "The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be. A 'doctrine of necessity' is just a fancy name for a power to depart from the Code. Although courts in the days before bankruptcy law was codified wielded [such] power . . . in the name of "necessity"[,] today it is the Code . . . that must prevail."

• Section 524(g) of the Bankruptcy Code authorizes, in certain circumstances, a bankruptcy court to channel to an asbestos trust claims for asbestos-related bodily injury that run against non-debtors, such as corporate affiliates. One of the important limitations, however, is that such relief can be granted only with respect to claims that are *derivative* of claims against the debtor. In In re Combustion Engineering, 391 F.3d 190, 236 (3rd Cir. 2004), the bankruptcy court concluded that it would facilitate the corporate reorganization also to channel *non-derivative* liability. It found in section 105(a) the authority to grant such relief. The Third Circuit reversed. "The general grant of equitable power contained in § 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be

exercised within the parameters of the Code itself. When the Bankruptcy Code provides a specified means for a debtor to obtain a specific form of equitable relief, those standards and procedures must be observed." *See also* Resorts Int'l v. Lowenschuss, 67 F.3d 1394, 1402 (9th Cir.1995) ("Section 105 does not authorize relief inconsistent with more specific law").[1]

Even leaving aside the practical consequences that a broad ruling by this Court on the meaning of section 105 might have on the application of the rule of law in bankruptcy courts, traditional tools of statutory construction — and the principle that a specific provision must trump a general one — counsel strongly against the respondents' position. The negative inference arising from the language of section 706(a) is clear. This specific expression of congressional intent must surely prevail over the general background of equitable power reflected in section 105(a).

III. FOLLOWING THE PROCEDURE ESTABLISHED BY THE STATUTE AND THE APPLICABLE RULE DOES NOT EXALT FORM OVER SUBSTANCE.

The respondents also argue that it would exalt form over substance to require conversion to chapter

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[1] Notwithstanding the statements in the Government's brief about the role of the Office of the U.S. Trustee as a "watchdog" to prevent "overreaching" in the bankruptcy arena, Br. of U.S. at 1-2, that Office has not exercised nearly the vigilance in guarding against "overreaching" in the context of corporate reorganizations that it has in the context of individual debtor cases. For example, it raised no objection to the "overreaching" criticized by the courts of appeals in either of the cases cited above.

13 only to have the case converted back to chapter 7 because of bad faith in filing a plan, 11 USC §1325(a)(3). But the fact that the Bankruptcy Code provides *another* means of addressing the problem presented by debtors who convert their cases to chapter 13 in bad faith is a reason to *adhere* to the design set in the statute by Congress, not a reason to depart from it.

The scheme set out by Congress merely gives every debtor who exercises the right to convert a case to chapter 13 an *opportunity* to seek to persuade a bankruptcy court that proceeding in chapter 13 is appropriate and that he will be able to pay his creditors more under a chapter 13 plan than they would be paid in chapter 7. There is certainly no assurance that the bankruptcy court will be persuaded by that argument. While in the ordinary case it would be appropriate for the bankruptcy court to give a debtor the opportunity to present a chapter 13 plan — which under the Bankruptcy Rules must be filed within 15 days of filing or conversion, Fed.R.Bankr.Pro. 3015(b) — so that the question of good faith can be examined in a concrete context, the statute contains no *per se* prohibition, in an exceptional case, against bringing the question of "good faith" to a hearing on an even more expedited basis.[2]

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[2] While the case law addressing the question of what constitutes the type of "bad faith" that would justify the conversion or dismissal of a bankruptcy case is less than entirely uniform, the better reasoned cases focus the enquiry on the debtor's basic honesty of purpose. *See* Keach v. Boyajian (In re Keach), 243 B.R. 851 (1st Cir. BAP 2000). Specifically, the court in Keach noted that the primary focus should be on post-petition events, and whether the plan complies with the other requirements of the Code. The panel concluded that it was error for the bankruptcy court in

At bottom, the petitioner here seeks only the narrow right that Congress has unambiguously granted him — the chance to convert his case to one under chapter 13, and seek to persuade the bankruptcy court and his creditors — through the submission of a valid and confirmable chapter 13 plan — that it belongs there.

The decisions below — which denied the petitioner even the opportunity to argue that his chapter 13 plan would best serve the interests of his creditors — effectively arrogated to the court a public policy decision made by Congress. After all, it is Congress that decided what kind of debts may be discharged, and whether some debts would be dischargeable in chapter 13 but not in chapter 7. It is not bad faith to seek a remedy that Congress has granted. *See* In re Croston, 313 B.R. 447 (9th Cir. BAP 2004), *citing* Street v. Lawson (In re Street), 55 B.R. 763 (9th Cir. BAP 1985) ("neither conduct nor motive vitiates the absolute nature of the right to convert;" conversion after a judgment of non-dischargeability is not "manipulation of the Bankruptcy Code"); In re Miller, 113 B,R, 98 (Bkrtcy.D.Mass. 1990) (In Massachusetts, declaring a homestead exemption is not a fraudulent transfer because it is not a "transfer" at all and is expressly permitted by statute; it is not "bad faith" to do what the law allows).

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that case to deny confirmation *inter alia* based on what the bankruptcy court perceived to be an inadequate dividend to general unsecured creditors; rather, so long as the dividend fulfilled the requirements of 11 USC §1325(a)(4), confirmation may not be denied based on the bankruptcy court's perception of the debtor.

Again, the bankruptcy court may or may not be persuaded that the petitioner's plan was in fact filed in good faith and would be in the best interest of his creditors. But against that backdrop, the fact that a chapter 13 case can be converted back to chapter 7, on the grounds of a debtor's bad faith, is a *solution* to the problems that respondents identify, and surely is not a reason to disregard the congressional design on the ground that they deem it to be less efficacious than one that they might have designed themselves.

The discretion-conferring approach to interpretation of the statute is not only contrary to its plain language, it inserts into the process the element of unpredictability. That is, if the right to convert from chapter 7 to another chapter can be denied on unwritten, subjective, "totality of the circumstances" grounds, no debtor and no debtor's attorney will know under what circumstances conversion will be allowed or whether the debtor will be punished for seeking conversion in circumstances that a court believes constitute "bad faith".[3]

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[3] Neither respondent nor their *amici* have posited a clear standard for determining bad faith, which is necessary in order to lend predictability to the process. Neither does a review of decisions of lower courts suggest a standard that this Court could establish. *Compare* In re Porter, 276 B.R. 32 (Bkrtcy.D.Mass. 2002) ("In this case, the misrepresentations in the Debtor's Schedules, and the tenuous nature of the Plan with its significant family contributions, coupled with the Debtor's filing of the Motion to Convert to escape the effects of the Chapter 7 Trustee's pending adversary proceedings, constitute circumstances sufficiently extreme to warrant denial of the Debtor's Motion."), *with* In re Carrow, 315 B.R. 8 (Bkrtcy.N.D.N.Y. 2004) ("Whether the Debtor will be able to confirm a chapter 13 plan is left for another day. The court is troubled by the Debtor's apparent $1,000 oversight in her income and has concerns about the proposed monthly gift from a third party to help fund a plan. While these concerns may raise questions of good faith and feasibility relevant

III. THE RESPONDENTS EXAGERATE THE DANGERS OF CONVERSION.

The respondents suggest that conversion to chapter 13 would result in something akin to a "no man's land", in which the debtor has unfettered freedom to do whatever he wishes with assets of the bankruptcy estate, safe from the searching eye of the chapter 7 trustee and the court. The reality is quite different.

The duties of a chapter 13 trustee are set forth in 11 USC § 1302, and expressly incorporate most of the

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to a future confirmation hearing under § 1325(a)(3) and (a)(6), respectively, they are not yet ripe for judicial intervention.").

It is true that in considering confirmation, the court may consider the debtor's good faith in filing a plan, 11 USC §1325(a)(3). However, as the Keach panel recognized, the bankruptcy court's subjective opinion of the debtor is not relevant in considering good faith. Rather, where a plan complies with the requirements of chapter 13, the court must confirm the plan; the court, itself, is powerless to dictate the terms of a plan, both before and after confirmation. Muessel v. Pappalardo (In re Muessel), 292 B.R. 712, 717 (1st Cir. BAP 2003); Keach. Thus, the proper procedure for the bankruptcy court to follow when presented with a motion to convert pursuant to 11 USC §706 is to ensure that the conditions in the statute (i.e., that the case has not previously been converted and the debtor is qualified to be a debtor under the new chapter) are satisfied, and enter an order converting the case to chapter 13, whereupon the debtor has the opportunity to file a plan and parties in interest have an opportunity to object to the plan or to seek reconversion or dismissal. Fundamentally, this is the procedure followed by the bankruptcy court as reported in In re Cabral, 285 B.R. 563 (1st Cir. BAP 2002). Cabral is distinguishable from the present case, however, because there a plan had been filed and the bankruptcy court had before it evidence from which it could determine whether the plan had been filed in good faith. In Marrama's case, by contrast, no plan had been filed and the court had no basis whatsoever from which it could consider reconversion. Indeed, it did not so consider; it simply decided that the request for conversion had been made in bad faith and refused to allow the conversion.

duties of a chapter 7 trustee. These include the duty to investigate the affairs of the debtor and, if advisable, oppose the debtor's discharge. Furthermore, the trustee has standing to seek conversion or dismissal pursuant to § 1307. The chapter 13 trustee also has some of the duties of a chapter 11 trustee.[4] Thus, in some sense, a chapter 13 debtor is subject to greater supervision than a chapter 7 debtor, particularly because some post-petition assets become property of the estate. 11 USC § 1306. Furthermore, the debtor's assets continue to be property of the estate until the discharge is issued; the fact that property revests in the debtor upon confirmation does not mean that the bankruptcy estate ceases to exist. Barbosa v. Soloman, et al, 235 F.3d 31 (1st Cir. 2000). Thus the respondent's concern (and that of the First Circuit) about conversion potentially harming creditors, or giving the debtor a free hand, are without foundation.

As the court in In re Croston, 313 B.R. 447 (9th Cir. BAP 2004), observed, "Sometimes, a problem debtor surprises everyone and winds up confirming and performing a chapter 13 plan that pays creditors more than they would receive in chapter 7 and leaves everyone better off." The legislative history of §706 makes it clear that Congress wanted debtors to have than chance, and that Congress thought it is in the best interests of creditors to *give* debtors that chance. The respondents have not adduced any sound reason to disregard the congressional judgment on this matter of public policy, reflected by the unambiguous

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[4] Ordinarily a trustee is not appointed in chapter 11 cases, but a trustee may be appointed "for cause." 11 USC §1104.

text of the statute, and confirmed by the legislative history.

CONCLUSION

The plain language of 11 USC §706 states that a debtor may convert a chapter 7 case to another chapter, so long as the debtor is qualified to be a debtor in the chapter to which conversion is sought and the case has not been previously converted. Neither the court's inherent power nor §105 authorizes deviation from the clear statutory mandate. Furthermore, the respondents' concerns about harm to creditors are wholly unwarranted, especially since the chapter 13 trustee has virtually the same power as a chapter 7 trustee, and the bankruptcy judge remains the ultimate arbiter of the case.

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Dated: October 26, 2006

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No. 05-996

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether 11 U.S.C. 706(a) deprives a bankruptcy court of its inherent power to sanction and deter bad faith conduct by denying a debtor's request to convert a chapter 7 bankruptcy case to chapter 13.

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INTEREST OF THE UNITED STATES

The courts below found that petitioner, a debtor in bankruptcy, had made false declarations about his assets and financial affairs in furtherance of a scheme to place his assets beyond the reach of his creditors. Because of petitioner's bad faith conduct, the courts below did not allow petitioner to convert his chapter 7 case to chapter 13. Whether courts may act to deter and sanction a debtor's bad faith conduct in that manner is an issue of substantial importance to the United States.

The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees in regions comprising the vast majority of the federal judicial districts. 28 U.S.C. 581-589a. United States Trustees "serve as bankruptcy watch-

dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). The United States Trustee Program thus "acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system." U.S. Dep't of Justice, *United States Trustee Program Strategic Plan FY 2005-2010*, at 2 (visited Sept. 28, 2006) <http://www.usdoj.gov/ust/eo/ust_org/StrategicPlanFY2005-2010.pdf>. By statute, "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this Title." 11 U.S.C. 307.

In addition, the United States is the largest creditor in the Nation, and numerous federal agencies, including the Department of Housing and Urban Development, the Commerce Department's Economic Development Administration, the Small Business Administration, the Internal Revenue Service, and the Federal Deposit Insurance Corporation, frequently appear as creditors in chapter 7 proceedings. Because a bankruptcy estate's assets are typically scarce, the United States has an interest in preventing and deterring chapter 7 debtors from concealing assets that should be turned over to satisfy claims of the United States.

STATEMENT

1. a. A debtor commences a voluntary bankruptcy case by filing a petition in bankruptcy court. 11 U.S.C. 301. Four chapters—7, 11, 12, and 13—are potentially available to an individual debtor, and the debtor is required to elect one by checking the appropriate box on the petition. Fed. R. Bankr. P. Official Form 1.

Within 15 days after filing the petition, the debtor must file under penalty of perjury a schedule of assets

and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs. 11 U.S.C. 521(1); Fed. R. Bankr. P. 1007(c); Official Form 6 (Schedules), Form 7 (Statement of Financial Affairs)).

b. Individual debtors typically file for relief under chapter 7 or chapter 13. Chapter 7 provides for a liquidation of a debtor's assets in exchange for a discharge of debts. 11 U.S.C. 701-727. Commencement of a chapter 7 case creates an "estate" that includes all of the debtor's interests in property as of the commencement of the case. 11 U.S.C. 541(a). The debtor must surrender all non-exempt estate property to the chapter 7 trustee, who takes custody of estate property, liquidates it, and disburses the proceeds to creditors in accordance with their rights and priorities under the Bankruptcy Code. 11 U.S.C. 507, 521(3) and (4), 704(1), 726.

A chapter 7 debtor is entitled to a discharge of his pre-petition debts unless the debtor is ineligible or the debts are of a type excepted from discharge by the Code. 11 U.S.C. 523, 727(a) and (b). Courts have the authority, however, to dismiss a chapter 7 case "for cause." 11 U.S.C. 707(a). Similarly, notwithstanding disbursement of estate assets to creditors, courts may deny a chapter 7 discharge altogether in specified circumstances, including when the debtor has committed acts of concealment or fraud. 11 U.S.C. 727(a)(2)-(6).

Chapter 13 provides for the adjustment of debts of an individual with regular income. 11 U.S.C. 1301-1330. In contrast to chapter 7, a chapter 13 debtor remains in possession of estate assets and receives a discharge of his debts only after he pays his creditors under a plan confirmed by the court. 11 U.S.C. 1304, 1306(b), 1321-1328.

c. Debtors may convert their cases from one chapter to another. 11 U.S.C. 706(a), 1112(a), 1208(a), 1307(a). As relevant here, Section 706(a) provides that "[t]he debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title." The Code also authorizes a court in a proceeding under chapter 13 to dismiss the case or convert it to a chapter 7 case "for cause." 11 U.S.C. 1307(c).

2. On March 11, 2003, petitioner filed a voluntary bankruptcy petition under chapter 7. In petitioner's schedules of assets, petitioner declared, under penalty of perjury, that (a) his Gloucester, Massachusetts, residence was the only real property interest he held; (b) he was the 100% beneficiary of Bo-Mar Realty Trust, a spendthrift trust that held real property in Maine; (c) the current market value of his interest in the trust was zero; and (d) the Internal Revenue Service (IRS) owed him no tax refunds. Pet. App. 10, 30.

Respondent Mark G. DeGiacomo is the chapter 7 trustee appointed in petitioner's case. Based on the trustee's investigation of petitioner's financial affairs (see 11 U.S.C. 704(4)), the trustee concluded that petitioner had failed to disclose two estate assets in his schedules and statement of financial affairs. First, petitioner had not disclosed that he, within one year before filing his chapter 7 petition, transferred residential real estate in York, Maine, having an unencumbered value of $85,000 to the Bo-Mar Realty Trust for no consideration and designated himself sole beneficiary and his girlfriend sole trustee. J.A. 29a-31a; Pet. App. 12, 30. Petitioner's acknowledged intent in that transaction was to protect the property from the claims of his creditors. *Id.* at 30. Second, petitioner had failed to disclose that

in July 2002, he had filed an amended tax return that sought a tax refund from the IRS. *Id.* at 26-27, 30; J.A. 30a-31a. The chapter 7 trustee subsequently informed petitioner that the trustee would seek to avoid the transfer of the Maine property to the trust as a fraudulent conveyance. Pet. App. 14; J.A. 30a; see 11 U.S.C. 548. Thereafter, petitioner filed a notice under Section 706(a) seeking to convert his case to chapter 13. J.A. 11a.

The chapter 7 trustee opposed the conversion on the ground that petitioner had acted in bad faith by intentionally failing to disclose his requested federal tax refund and his transfer of the Maine property to the trust seven months before his chapter 7 petition. Pet. App. 30-31; J.A. 13a-18a. Respondent Citizens Bank of Massachusetts, a secured creditor, also opposed conversion on the ground that the debtor had acted in bad faith. Pet. App. 13; J.A. 19a-25a. Petitioner responded that his misstatements and omissions were inadvertent and that he sought to convert his case to chapter 13 because he had acquired additional rental income and gainful employment. Pet. App. 31; J.A. 33a.

3. a. After conducting a hearing on petitioner's request to convert, the bankruptcy court denied conversion on the ground that petitioner's misrepresentation of his financial affairs constituted "bad faith." Pet. App. 15, 31; J.A. 34a-35a; Supp. J.A. 33. The Bankruptcy Appellate Panel of the First Circuit affirmed. *Id.* at 9-28.

b. The First Circuit affirmed. Pet. App. 29-46. After examining the statutory text of Section 706(a), the court concluded that it could "discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceedings." *Id.* at 33. The court

also rejected (*id.* at 37-38) petitioner's reliance on the Senate Report accompanying Section 706(a), which states that Section 706(a) gives the debtor "the one-time absolute right of conversion" and reflects the policy "that the debtor should always be given the opportunity to repay his debts." S. Rep. No. 989, 95th Cong., 2d Sess. 94 (1978). The court of appeals explained that those statements, when read in context, did not "negate[] nor undermine[] the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code." Pet. App. 38.

The court of appeals further observed that "the Code accords the bankruptcy court discretion to reconvert a chapter 13 case to chapter 7 * * * where the debtor has acted in 'bad faith.'" Pet. App. 39; see 11 U.S.C. 1307(c). The court explained that "it would ill serve general policies aimed at promoting the efficient administration of bankruptcy cases to insist that a bankruptcy court—already confronted with clear evidence of a debtor's bad faith—must indulge in the technical formality of converting the chapter 7 case to chapter 13, knowing full well that eventually the case must be reconverted by reason of that same evidence of bad faith." Pet. App. 39. The court also determined that the record "amply supported" the bankruptcy court's finding that petitioner acted in bad faith. *Id.* at 41.

c. While petitioner's appeal of the denial of his conversion motion was pending, the chapter 7 trustee recovered the Maine property from the trust in order to liquidate it for the benefit of petitioner's creditors. *Marrama* v. *DeGiacomo (In re Marrama)*, 316 B.R. 418,

421-422 (B.A.P. 1st Cir. 2004). Furthermore, Citizens Bank of Massachusetts filed a complaint under 11 U.S.C. 727(a)(2) seeking to deny the debtor a discharge on the grounds that petitioner had engaged in pre-bankruptcy transfers to defraud his creditors. The bankruptcy court granted the denial of a discharge. That order was affirmed by the court of appeals, which concluded that petitioner "transferred valuable assets belonging to him, less than a year before he petitioned for bankruptcy protection, with the actual intent to defraud his creditors." *Marrama* v. *Citizens Bank (In re Marrama)*, 445 F.3d 518, 524 (1st Cir. 2006).

SUMMARY OF ARGUMENT

A. Courts have the inherent power to respond to a party's misconduct in litigation by entering sanctions such as dismissal of the lawsuit or an award of attorney's fees. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980); *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962). Similarly, Congress indicated in Section 105(a) of the Bankruptcy Code that bankruptcy courts may "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a).

B. Nothing in the text of Section 706(a) strips the bankruptcy court of its inherent authority, reinforced in Section 105(a), to prevent and deter abuses of the bankruptcy system by denying a debtor relief to which he would otherwise be entitled. Section 706(a) provides that the "[t]he debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time" if the case has not been previously converted to chapter 7 under another chapter. 11 U.S.C.

706(a). The statute does not confer an absolute right, and nothing in the statutory text even mentions, much less impairs, the bankruptcy court's inherent discretion to deny relief in the face of a debtor's bad faith—discretion that is explicitly confirmed in Section 105(a).

C. The bankruptcy court's inherent power to deny conversion to chapter 13 is not foreclosed by Section 1307(c), which permits the court to dismiss a chapter 13 case or convert it to chapter 7 for cause (including the debtor's bad faith). To the contrary, that provision only underscores the appropriateness of denying conversion to chapter 13 in circumstances such as this. Congress's express authorization to convert a chapter 13 case into a chapter 7 liquidation indicates that a denial of rights under chapter 13 is a proper sanction for fraud. Section 1307(c) cannot be read to preclude a court from addressing fraud that is evident before the attempted conversion to chapter 13 or to require a conversion just so that the case can be reconverted to chapter 7. Under this Court's precedents, moreover, statutory and procedural sanctions generally do not displace a court's inherent power. *Chambers*, 501 U.S. at 42-51; *Link*, 370 U.S. at 630-632.

It would make little sense for the bankruptcy court to convert a case to chapter 13 under Section 706(a) when the court has already determined that the debtor has acted in bad faith such that his case should not proceed under chapter 13. Nor should a bad faith debtor have a right to convert to chapter 13 so that he may propose a plan under that chapter. The Code nowhere confers such a right, because Section 1307(c) allows the court, "for cause," to dismiss the chapter 13 case or con-

vert it to chapter 7 at any time without any prerequisite that the debtor first be permitted to propose a plan.

D. Section 706(a)'s legislative history does not establish that Congress intended to displace the bankruptcy court's power to sanction bad faith debtors. The Senate Report to Section 706(a) states that the provision confers on the debtor "the one-time absolute right of conversion" so that "the debtor should always be given the opportunity to repay his debts." S. Rep. No. 989, 95th Cong., 2d Sess. 94 (1978). The off-hand reference to the debtor's "absolute" right may simply be a recognition of the fact that the right cannot be waived by agreement. The Report did not address the situation in which the right to convert has been forfeited by fraud, and it would be a mistake to assume that Congress intended to immunize fraud on courts and creditors. A Senate Report is not written and should not be read like legislative text, and petitioner's argument shows the hazards of doing so. In any event, the legislative history, when read in context, reflects an intent to confer rights only on an *honest* debtor who intends to "repay his debts." *Ibid.* The statute's history thus does not purport to cabin a court's inherent power to prevent an abuse of process.

E. A bankruptcy court has the discretion to deny conversion when the debtor intentionally misleads the trustee, creditors, or the bankruptcy court as to the debtor's financial affairs. A debtor who comes to the bankruptcy court seeking relief from his debts, but who in bad faith fails to disclose assets that are to be used to pay creditors, commits gross misconduct that threatens both the foundation and the integrity of the bankruptcy process. Because the bankruptcy court found that petitioner's misstatements of his financial affairs were made in bad faith, the court properly denied conversion

in order to sanction the debtor and to prevent further abuse of process.

ARGUMENT

BANKRUPTCY COURTS POSSESS INHERENT POWER TO DENY CONVERSIONS WHEN SOUGHT BY BAD FAITH DEBTORS

A. Bankruptcy Courts Possess The Inherent Power To Sanction Bad Faith Conduct

1. This Court's precedents have "recognized the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980) (citing *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962)). "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Ibid.* (quoting *Link*, 370 U.S. at 630-631).

"A primary aspect" of a court's inherent powers is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45. A court thus confronted with a party's bad faith conduct in seeking judicial relief or in litigating his cause of action has the discretion to respond with a variety of sanctions. This Court has recognized that

"outright dismissal of a law suit * * * is within the court's discretion" and that "the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id.* at 45 (quoting *Roadway Express, Inc.*, 447 U.S. at 765).

A clear expression of congressional intent is required to displace a court's inherent power to sanction bad faith conduct. *Chambers*, 501 U.S. at 47. Accordingly, although "the exercise of the inherent power of lower federal courts can be limited by statute and rule," this Court will "'not lightly assume that Congress has intended to depart from established principles,' such as the scope of a court's inherent power." *Ibid.* (quoting *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

2. The Bankruptcy Code, far from displacing the inherent powers of courts, expressly recognizes the bankruptcy court's authority to sanction litigants for abusive litigation practices. The Code states that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process*." 11 U.S.C. 105(a) (emphasis added); see 132 Cong. Rec. 28,610 (1986) (statement of Sen. Hatch) (Section 105(a) "allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner"). Thus, it is well established that bankruptcy courts have

the power to sanction parties or counsel for bad faith conduct in bankruptcy proceedings.[1]

To be sure, Section 105(a) does not empower bankruptcy courts to act contrary to other direct commands of the Code. Cf. *Northwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"). But it does expressly caution against reading provisions allowing a party to raise an issue as conferring an absolute right that would trump a court's ability to sanction misconduct. More broadly, Section 105(a) reflects Congress's intent not to displace the established power of courts to impose appropriate orders to prevent an abuse of process. Thus, absent an express provision in the Code that limits a court's inherent power, the bankruptcy court retains the discretion to impose appropriate sanctions in response to a litigant's bad faith.

B. The Text Of Section 706(a) Does Not Restrict A Court's Inherent Power To Deny Conversion When Requested By A Bad Faith Debtor

1. Section 706(a) does not expressly address, much less limit, a court's inherent power to sanction bad faith

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[1] See, e.g., *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304-1306 (11th Cir. 2006); *In re DeVille*, 361 F.3d 539, 548-551 (9th Cir. 2004); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046-1049 (7th Cir. 2000); *Pearson* v. *First N.H. Mortgage Corp.*, 200 F.3d 30, 42 n.7 (1st Cir. 1999); *Weiss* v. *First Citizens Bank & Trust Co. (In re Weiss)*, 111 F.3d 1159, 1171-1172 (4th Cir.), cert. denied, 522 U.S. 950 (1997); *Mapother & Mapother, PSC* v. *Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996); *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994); *Citizens Bank & Trust Co.* v. *Case (In re Case)*, 937 F.2d 1014, 1023-1024 (5th Cir. 1991).

conduct by denying relief to which the debtor would otherwise be entitled. Section 706(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. 706(a). As an initial matter, the text is addressed to the *debtor*, and does not refer to the court's powers at all. By providing that "*[t]he debtor may* convert" a chapter 7 case to another chapter, Congress indicated its intent that conversion is to be initiated by the debtor, rather than another party or the court. But the language does not confer an absolute right on the debtor and does not direct the court to convert automatically upon the debtor's request.

In any event, the statutory text, at most, gives rise to a presumptive right of the debtor to a one-time conversion; it does not restrict, either expressly or implicitly, the ability of the court to exercise its inherent power to respond to abusive tactics or bad faith by the debtor. Section 706(a) is best understood as giving the right to raise the issue of conversion, but in keeping with the approach expressed in Section 105(a), such a provision should not be read to prevent courts from "taking any action * * * to prevent an abuse of process." 11 U.S.C. 105(a). Nor does Section 706(a) purport to confer rights on bad faith debtors. The statutory language "contains no intimation that the debtor should be accorded protection against his own willful misconduct, such as an intentional abuse of the bankruptcy process." Pet. App. 36.

Relying on this Court's recognition that "[t]he word 'may' customarily connotes discretion," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005), petitioner's amicus argues that Section 706(a) vests debtors with unbounded discretion to decide whether to convert, thereby stripping the court of any power to deny relief. National Ass'n of Consumer Bankr. Att'ys (NACBA) Amicus Br. 8-13. The word "may," however, does not remotely rise to the level of a clear indication that Congress intended to restrict a court's inherent power to sanction a party's bad faith conduct by denying statutory relief to which that party would otherwise be entitled. While it is no doubt true that the term "may" suggests discretion, it is equally true that "in a system of laws discretion is rarely without limits." *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 710 (2005) (quoting *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 (1989)); see *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 648 (1961) ("discretion is never without limits"). Considerably more than the mere recognition of a discretionary right would be required to demonstrate that Congress stripped the courts of their inherent authority to deny relief sought in bad faith.[2]

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[2] The example proffered by petitioner's amicus (NACBA Amicus Br. 8) serves only to confirm the implausibility of petitioner's interpretation. A neighbor's statement to another that "You may use my rake at any time" may well "grant[] the other neighbor permission to use the rake at the latter's discretion," *ibid.*, but it does not confer *unlimited* discretion. Surely, for example, the other neighbor is not thereby authorized to grab the rake unceremoniously out of its owner's hands while the latter is raking his yard. Nor is it obvious that the discretion to borrow the rake would survive an intervening misuse of a borrowed shovel.

For similar reasons, petitioner's amicus errs in relying on the fact that Section 706(a) specifies two express preconditions to conversion—(1) absence of a prior conversion and (2) eligibility as a debtor, see 11 U.S.C. 706(d)—but does not expressly impose a good faith requirement. NACBA Amicus Br. 13-16. The *expressio unius* canon has no application to a requirement that a litigant refrain from bad faith, because that requirement is necessarily implicit whenever a party seeks relief from a court. In other words, because "[a]ll courts have inherent power and duty to prevent abuse of their jurisdiction," "Congress does not have to add to each and every statutory subsection and committee comment thereon the proviso, 'subject to bad faith.'" *In re Starkey*, 179 B.R. 687, 693 (Bankr. N.D. Okla. 1995).

2. The court of appeals also correctly concluded that Congress' use of the statutory phrase "at any time" in Section 706(a) refers to *the time frame* in which the debtor may convert; it does not speak to the *circumstances* under which conversion may occur. At most, that phrase confers an absolute right to convert without regard to time frame, not an absolute right to convert no matter what. Thus, "the debtor may seek to convert at any time during the pendency of the bankruptcy case, or in other words, * * * no artificial time constraints should impede an election to convert." Pet. App. 35. But that temporal phrase "hardly equates to the more broad circumstantial permission which Congress could have conferred, for example, by employing a phrase such as 'regardless of the circumstances.'" *Ibid.*; accord *In re Copper*, 426 F.3d 810, 816 (6th Cir. 2005).

Likewise, a court's inherent power to sanction abuse is not affected by the second sentence of Section 706(a),

which provides that "[a]ny waiver of the right to convert a case under this subsection is unenforceable." 11 U.S.C. 706(a). "[I]n context this sentence functions strictly as a consumer protection provision against adhesion contracts, whereby a debtor's creditors might be precluded from attempting to prescribe a waiver of the debtor's right to convert to chapter 13 as a non-negotiable condition of its contractual agreements." Pet. App. 35. There is a difference between waiver and forfeiture, see, *e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004), and an anti-waiver provision does not necessarily preclude a party from forfeiting a right through affirmative misconduct or immunize a party from the court's inherent authority to sanction misconduct.[3]

[3] Petitioner also argues (Br. 26) that conversion cannot be denied on the basis of a debtor's bad faith because the Bankruptcy Rules do not specifically require motions to convert under Section 706(a) to be treated as contested matters under Rule 9014. As the court of appeals observed, however, the Code contemplates that parties in interest may contest at least some factual pre-conditions to conversion, such as "the absence of any prior conversions to chapter 13, and the debtor's ability to meet the eligibility requirements to file a chapter 13 petition in the first instance." Pet. App. 45. Moreover, the Rules provide that a debtor requesting conversion under Section 706(a) must seek that relief by motion. See Fed. R. Bankr. P. 1017(f)(2), 9013. The Rules thus also contemplate that the bankruptcy court will review the matter before ordering relief. In any event, nothing in Rule 9014(c) addresses, much less displaces, a court's inherent power to act, sua sponte or on motion of a party, in the face of a debtor's abuse of the bankruptcy process, nor do the Rules limit the court's ability to hold any hearing that may be necessary in such instances to resolve contested issues of material fact.

C. A Bankruptcy Court's Express Power To Dismiss A Chapter 13 Case Or Convert It To Chapter 7 Does Not Deprive The Court Of Its Inherent Authority To Deny Conversion In The First Instance

1. Section 1307(c) provides that "on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under [chapter 13] to a case under chapter 7 * * * , or may dismiss a case under [chapter 13], whichever is in the best interest of creditors and the estate, for cause." 11 U.S.C. 1307(c). A debtor's bad faith constitutes cause under Section 1307(c).[4] Petitioner and his amicus argue that because Congress empowers a bankruptcy court to respond to a debtor's bad faith by dismissal of the chapter 13 case or by reconversion of the case to chapter 7, Congress left no room under Section 706(a) for courts to deny conversion in the first instance even when the debtor seeks conversion in bad faith or the court is aware of pre-conversion efforts to defraud the court and creditors. Pet. Br. 24; NACBA Amicus Br. 18-20. That contention lacks merit.

The law is clear that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. Thus, in *Link*, 370 U.S. at 630-632, this Court held that a court had the inherent authority to dismiss a suit sua sponte for lack of prosecution notwithstanding the fact that Federal Rule of Civil Procedure 41(b) appears to

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[4] See, *e.g.*, *Alt* v. *United States (In re Alt)*, 305 F.3d 413, 418-420 (6th Cir. 2002); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996); *Molitor* v. *Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996); *Eisen* v. *Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992).

require a motion by a party. Similarly, in *Chambers*, 501 U.S. at 42-50, the Court held that a court's inherent power to impose attorney's fees as a sanction was not foreclosed by Federal Rule of Civil Procedure 11 and 28 U.S.C. 1927, which authorize the imposition of attorney's fees as a sanction in specified circumstances. The Court explained that other mechanisms of sanctioning misconduct, either "taken alone or together, are not substitutes for the inherent power," and accordingly that federal courts are not "forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." *Chambers*, 501 U.S. at 46, 50. Thus, "if in the informed discretion of the court, neither the statute nor [procedural rules] are up to the task, the court may safely rely on its inherent power." *Id.* at 50.

There is no basis for limiting the court's inherent discretion to enter sanctions at the earliest appropriate opportunity, *i.e.*, by denying conversion in the first instance. "[I]t would ill serve general policies aimed at promoting the efficient administration of bankruptcy cases to insist that a bankruptcy court—already confronted with clear evidence of a debtor's bad faith—must indulge in the technical formality of converting the chapter 7 case to chapter 13, knowing full well that eventually the case must be reconverted by reason of that same evidence of bad faith." Pet. App. 39. As the court of appeals of appeals observed, the Code does not require "such pointless spinning of judicial wheels." *Ibid.* Indeed, far from undermining the authority to deny conversion as a sanction for bad faith, Section 1307(c) underscores the appropriateness of requiring chapter 7 liquidation as a sanction. The fact that

Congress expressly contemplated dismissal or conversion of chapter 13 proceedings as a sanction for bad faith conduct should not preclude a court hearing a chapter 7 case from imposing a like sanction for bad faith that precedes an effort to convert to chapter 13.

2. Petitioner and his amicus contend that forcing a court to grant a debtor's motion to convert, even in the face of fraud on the court or other egregious misconduct by the debtor, would serve the purpose of giving the debtor an opportunity to propose a repayment plan under 11 U.S.C. 1322. Pet. Br. 22-26; NACBA Amicus Br. 18-20, 23-24. In a similar vein, petitioner's amicus observes that the bankruptcy court cannot confirm a chapter 13 plan unless unsecured creditors will receive at least as much as they would under chapter 7. *Id.* at 19-20 (citing 11 U.S.C. 1325(a)(4), 1328(b)(2)). Amicus argues that those provisions, along with the power of the chapter 13 trustee to investigate the debtor's financial affairs, "provide[] powerful assurance that a debtor cannot convert a case to chapter 13 in order to evade his creditors." *Id.* at 19. Those contentions are flawed in several fundamental respects.

Section 1307(c) contains no requirement that a bankruptcy court must wait for a debtor to propose a repayment plan before the court can exercise its statutory power to dismiss or reconvert the case to chapter 7 upon a finding of a debtor's bad faith. The notion that bankruptcy courts cannot act under Section 1307(c) without a prior proposal by the debtor of a plan also conflicts with Section 105(a), which permits a court to raise, on its own motion, the issue of dismissal or conversion to prevent an abuse of process. 11 U.S.C. 105(a) ("No provision of this title providing for the raising of an issue by

a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate * * * to prevent an abuse of process.") (emphasis added).

The bankruptcy court's dismissal and conversion power under Section 1307(c), moreover, defeats the suggestion that Congress intended to confer on a bad faith debtor the right to propose a plan under chapter 13. And there is "neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance." Pet. App. 36.

Petitioner's position similarly creates anomalous results that Congress could not have intended, as it would accord preferential treatment to bad faith debtors who initially sought relief under chapter 7, instead of chapter 13. For instance, when confronted with a bad faith debtor who initially files under chapter 13, a court unquestionably has the power to dismiss or convert the case pursuant to Section 1307(c), without waiting for the debtor to file a plan. By contrast, in petitioner's view, a bad faith debtor who initially requests chapter 7 relief but subsequently seeks to convert to chapter 13 is entitled to file a chapter 13 plan without the possibility of intervention by the court to prevent an abuse of process, at least until a plan is filed. Petitioner's proposal is wholly implausible; it finds no support in the Code, and it would frustrate the underlying purpose of the bankruptcy court's power to sanction bad faith conduct, namely, to protect the integrity of the bankruptcy system and deter similar abuses by other debtors.

In any event, there is no guarantee that creditors will be protected once a bad faith debtor converts his case to chapter 13. A debtor who has tried to defraud his creditors in chapter 7 may not mend his ways just because his case converts to chapter 13, particularly because the chapter 7 trustee will have been replaced by a new chapter 13 trustee (who presumably will have less experience with the debtor's past misconduct) and the debtor will have gained control over the assets of the estate. See, *e.g.*, *In re Copper*, 426 F.3d at 810-816 (debtor lied about assets and, on the eve of trial in which divorce-decree debt would be determined to be non-dischargeable, moved to convert with no intent to pay ex-wife under chapter 13); *In re Sully*, 223 B.R. 582, 583-586 (Bankr. M.D. Fla. 1998) (debtor hid settlement of personal injury action from trustee, and once misconduct was discovered, debtor moved to convert under chapter 13 with no intent to pay creditors); *Martin* v. *Cox*, 213 B.R. 571, 572-574 (E.D. Ark. 1996) (debtor who, *inter alia*, falsified documents, failed to list significant assets in petition, made false representations to bankruptcy court, and violated a bankruptcy court's preliminary injunction order attempted to convert to chapter 13 with no intent to propose chapter 13 plan), aff'd, 116 F.3d 480 (8th Cir. 1997) (Table). Indeed, it has been the experience of the United States Trustees that bad faith debtors who convert to chapter 13 on the heels of the chapter 7 trustee's discovery of concealed assets often never file a plan.

Requiring a court to respond to a debtor's bad faith only after the debtor has proposed a chapter 13 plan would thus shift to innocent creditors the risk that a chapter 13 plan will never be proposed or confirmed. And even if a plan is confirmed, there is no assurance

that the debtor, who has already once attempted to defraud his creditors, will make payments under the plan.

Similarly, there is no guarantee that creditors would be protected while the case languishes in chapter 13 or even if the case is ultimately converted back to chapter 7. When a chapter 7 case is converted to chapter 13, the chapter 7 trustee no longer has the power to collect and liquidate assets or administer the estate for the benefit of creditors. 11 U.S.C. 348(e). Instead, conversion to chapter 13 permits the debtor to regain control of all estate assets. 11 U.S.C. 1306(b). Petitioner's proposal would thus unjustifiably open the door for bad faith debtors to mishandle or squander their assets in furtherance of a scheme to defraud creditors. See, *e.g.*, *In re Wampler*, 302 B.R. 601, 606 (Bankr. S.D. Ind. 2003) (after trustee learned of debtor's recovery of class action settlement, debtor refused to turn over recovery, sought conversion to chapter 13, and placed a large portion of the recovery "in a Certificate of Deposit, thereby diminishing its immediate value due to the penalty for earlier withdrawal"); *In re Sully*, 223 B.R. at 585 ("Conversion would afford the Debtor the use of the settlement funds, and shift the risk to creditors without any feasible likelihood of repayment."); *In re Calder*, 93 B.R. 739, 740 (Bankr. D. Utah 1988) (denying conversion to "prevent the debtor from further abuse of the system").

Finally, an approach that would require a court to wait for a chapter 13 plan to be filed before responding to the debtor's bad faith is even less justified for cases governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. For bankruptcy cases filed after October 17, 2005, the bankruptcy court may confirm a chapter 13

plan only if "the action of the debtor in filing the petition was in good faith." § 102(g)(3), 119 Stat. 33 (to be codified at 11 U.S.C. 1325(a)(7)). Although petitioner's case was filed in 2003, before those changes became effective, the regime advanced by petitioner and his amicus would require a bankruptcy court, when confronted with a bad faith debtor's request to convert to chapter 13, to convert and give the debtor the opportunity to file a plan that Congress has categorically determined cannot be confirmed. Nothing in Section 706(a) requires that bizarre result.

D. The Legislative History Of Section 706(a) Does Not Reveal A Congressional Intent To Displace A Court's Inherent Power To Deny Relief To A Bad Faith Debtor

Petitioner asserts (Br. 20-23) that the legislative history of Section 706(a) supports his view that chapter 7 debtors who proceed in bad faith are nonetheless entitled to convert to chapter 13. There is no warrant for petitioner's apparent assumption that statements in congressional committee reports could suffice to override the inherent authority of the federal courts. As discussed, this Court will not "lightly assume" that Congress has limited or narrowed the scope of the inherent power. *Chambers*, 501 U.S. at 47. In any event, petitioner's interpretation of the legislative history is without merit.

1. The history of Section 706(a) contains no hint that Congress intended to require conversion when sought by a debtor acting in bad faith. The Senate Committee report accompanying Section 706(a) states:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan

> case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable.

S. Rep. No. 989, 95th Cong., 2d Sess. 94 (1978); accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 380 (1977). Placing emphasis on the words "absolute" and "always" in that passage, petitioner and his amicus argue that Congress intended to render bankruptcy courts powerless to deny a bad faith debtor's attempt to convert a chapter 7 case to another chapter. Pet. Br. 19-23; NACBA Amicus Br. 20-22.

Petitioner and his amicus make the mistake of reading the legislative history as if it were statutory text. But a Senate Report is not written, and should not be read, in that fashion. The Senate Report attempts to explain the operation of Section 706(a), and in doing so makes an off-hand reference to an "absolute right." Whatever the meaning of that phrase were it included in the operative statutory text, it is clear from context that the phrase reflects an effort to explain the text's right to file a conversion motion free from any time bar, so long as the case has not previously been converted. That reading is consistent with the sentencing following the reference to the debtor's "one-time absolute right," as that sentence makes clear that "[i]f the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right." S. Rep. No. 989, *supra*, at 94. As the court of appeals observed, the reference to the debtor's "absolute" right may also be

referring to the fact that "the debtor's right to conversion cannot be waived by contract." Pet. App. 37.

Under any reading of the Code, moreover, the Report's reference to an "absolute" right cannot be understood in the all-encompassing sense urged by petitioner, because conversion is expressly *prohibited*—and the right thus inoperative—when the debtor is not qualified to be a debtor under the other chapter. 11 U.S.C. 706(d). Nor is it literally true, as petitioner's reading of the Report suggests, that debtors "always" have the opportunity to repay their debts under chapter 13: Section 1307(c) permits the court to dismiss or convert a chapter 13 case for cause, and thus a *bad faith* debtor has no right whatsoever to repay his debts under chapter 13.

In any event, Section 706(a)'s legislative history does not mention, much less purport to remove, a court's inherent power to sanction and deter abuses of the bankruptcy system. There is no suggestion in the quoted passage above that Congress was addressing a *dishonest* debtor who was trying to defraud his creditors with no intention of repaying his debts. To the contrary, the passage is obviously referring to the *honest* debtor, as the overarching intent of Section 706(a) is to confer rights on a debtor who actually intends "*to repay his debts*." S. Rep. No. 989, *supra*, at 94 (emphasis added). But "[w]here conversion to [chapter] 13 amounts to an attempt to escape debts rather than to repay them, the reason for the rule ceases." *In re Spencer*, 137 B.R. 506, 512 (Bankr. N.D. Okla. 1992).

As the court of appeals correctly concluded, "[a] legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit

obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an ongoing scheme to retain his non-exempt assets from bona fide creditors." Pet. App. 39; see *In re Wampler*, 302 B.R. at 605 ("[T]he statute was intended to give only the *honest* debtor an opportunity to voluntarily repay his debts * * *. Section 706(a) was not intended as a way for the dishonest debtor to abuse the bankruptcy process, perpetrate a fraud or engage in bad faith behavior."). Section 706(a)'s legislative history thus provides no support for stripping bankruptcy courts of their power to prevent an abuse of process or to sanction and deter bad faith conduct.

E. A Bankruptcy Court Properly Exercises Its Inherent Power When It Denies Conversion Of A Chapter 7 Case Based On The Debtor's Bad Faith

1. A bankruptcy court acts within its discretion in denying a debtor's request to convert to another chapter when the debtor intentionally misrepresents his financial condition in the bankruptcy proceeding. Such misconduct constitutes an egregious abuse of the bankruptcy system, which has always limited relief to the "*honest* but unfortunate" debtor. *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244-245 (1934) (emphasis added). "[T]he successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure" of his assets and financial condition. Pet. App. 33 (quoting *Boroff* v. *Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987)); *In re Little*, 245 B.R. 351, 353-354 (Bankr. E.D. Mo. 2000) ("Perhaps to a greater degree than any other segment of our justice system, Bankruptcy depends on the integ-

rity of the information supplied by its principal participant, the debtor.").

The importance of honest and full disclosure of a debtor's assets is particularly acute in cases filed under chapter 7. That chapter generally grants the debtor a complete discharge of his pre-petition debts. 11 U.S.C. 727. But the Code explicitly conditions such relief on the debtor's release to creditors of *all* his pre-petition and non-exempt assets. 11 U.S.C. 725, 726, 727(a). A debtor who files under chapter 7 thus has an incentive to try to conceal assets to obtain the benefit of relief from all of his debts while shielding assets from the prospect of liquidation. Such efforts strike at the structural foundation upon which chapter 7 is premised. Accordingly, a court may properly deny conversion relief to chapter 7 debtors either to prevent further abuse of process or to sanction and deter similar misconduct.

Petitioner contends that permitting courts to respond to debtor's bad faith would not be administrable or provide debtors fair notice of what conduct is permissible because "[w]hat constitutes 'extreme circumstances' is not 'capable of pragmatic and mechanical application.'" Pet. Br. 17 (quoting *In re Noll*, 172 B.R. 122, 124 (Bankr. M.D. Fla. 1994)). The bankruptcy court's power under Section 105(a) to act in the face of abuse of process, however, puts debtors on clear notice that the court has discretion to take appropriate action when confronted with misconduct. Section 105(a) likewise necessarily recognizes that bankruptcy courts are fully competent to determine whether a litigant is engaging in an abuse of process. In any event, petitioner has no plausible claim that debtors are unaware of their obligation of complete candor and disclosure in their state-

ment of financial affairs and schedule of assets, as those obligations are expressly set forth in the Code and Rules. 11 U.S.C. 521; Fed. R. Bankr. P. 1008 (requiring "[a]ll petitions, lists, schedules, statements and amendments thereto" to be verified or supported by a declaration under penalty of perjury pursuant to 28 U.S.C. 1746).

"Bad faith," moreover, is a familiar concept in the law, and bankruptcy courts routinely consider whether a debtor's conduct constitutes bad faith in the course of assessing the existence of "cause" for dismissal or conversion to chapter 7 under 11 U.S.C. 1307(c). See p. 17 & n.4, *supra*; see 11 U.S.C. 707(a) (authorizing dismissal for cause); 11 U.S.C. 1112(b) (authorizing dismissal or conversion to chapter 7 for cause); 11 U.S.C. 1208(c) (authorizing dismissal for cause). Thus, the bankruptcy courts that have denied conversion relief under Section 706(a) for bad faith have adopted a standard that is substantially similar to the standard applied in determining whether a debtor's bad faith warrants dismissal or conversion to chapter 7 under Section 1307(c). As the court of appeals observed, courts generally consider "the totality of the circumstances," including such factors as "the accuracy of the debtor's financial statements," "any other attempts by the debtor to mislead the bankruptcy court or manipulate the bankruptcy process," and "the debtor's motivation in seeking to convert to chapter 13." Pet. App. 41.

2. The bankruptcy court here properly exercised its discretion to deny conversion of petitioner's case to chapter 13 because of petitioner's bad faith in filing his chapter 7 case. As the court of appeals observed, "[t]he instant case comports in all material respects with the

classic profile of playing fast and loose with the bankruptcy process." Pet. App. 42. Before filing for bankruptcy relief, petitioner transferred valuable property in an acknowledged attempt to shield it from his creditors, and he failed to disclose the transfer in filing for bankruptcy. While petitioner was prepared to face liquidation of the estate absent the fraudulently concealed assets, when the trustee discovered the non-disclosure and initiated steps to reclaim the property for the benefit of creditors, petitioner sought to convert the case to chapter 13, presumably not only to oust the chapter 7 trustee, but also to retain petitioner's interest in the concealed property and shield it from liquidation. *Ibid.*[5]

In refusing to transfer the case from chapter 7, the bankruptcy court properly sanctioned the debtor for his misconduct while preserving the interests of creditors. Because the case remained in chapter 7, the chapter 7 trustee was able to recover petitioner's Maine property and liquidate it for the benefit of creditors. *Marrama*, 316 B.R. at 421-423. In addition, based upon a finding that petitioner intended to defraud his creditors, petitioner was denied a discharge of his debts under

[5] Petitioner challenges the bankruptcy court's factual finding that he acted in bad faith and the court's failure to conduct an evidentiary hearing. Pet. Br. 11, 22, 24. Both the bankruptcy appellate panel and the court of appeals rejected those contentions, Pet. App. 25-27, 41-44, and the petition did not seek this Court's review of those factbound issues. Pet. i. Moreover, as a result of subsequent proceedings in petitioner's chapter 7 case the court of appeals held that petitioner "transferred valuable assets belonging to him, less than a year before he petitioned for bankruptcy protection, with the actual intent to defraud his creditors." *Marrama* v. *Citizens Bank (In re Marrama)*, 445 F.3d 518, 524 (1st Cir. 2006). It does not appear that petitioner sought further review of that decision, which is now final, so he is precluded from challenging that factual determination.

11 U.S.C. 727. *Marrama* v. *Citizens Bank (In re Marrama)*, 445 F.3d 518 (1st Cir. 2006).

Denial of a chapter 7 discharge thus enabled petitioner's creditors to obtain estate assets under 11 U.S.C. 726, as well as to pursue any outstanding claims against petitioner post-bankruptcy. By contrast, converting the case to chapter 13 to permit petitioner to propose a plan would expose petitioner's creditors to the possibility of further abuse of the bankruptcy process, and would inevitably delay the proper disposition of the case. See pp. 20-22, *supra*. The bankruptcy court's denial of conversion to chapter 13 thus protected the rights of petitioner's innocent creditors and enabled the court to ensure the integrity of the bankruptcy process, in keeping with the core purposes of the court's inherent authority.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS AND MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT, MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE*

The National Association of Bankruptcy Trustees ("NABT") is a non-profit association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country, and to promote the effectiveness of the bankruptcy system as a whole.[1] There are currently 1,200 bankruptcy trustees receiving new cases, and approximately 1,000 of these chapter 7 panel trustees are NABT members.

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[1] Undersigned counsel for NABT authored this brief in its entirety, and no other person or entity, other than NABT, has made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the submission of *amicus curiae* briefs has been lodged with the Clerk of the Court.

This appeal addresses the issue of whether a chapter 7 debtor has an absolute right to convert to a chapter 13 case, despite factual findings that establish bad faith and indicate that conversion would result in an abuse of the bankruptcy process. NABT supports the Respondent, Chapter 7 Trustee's position that a chapter 7 debtor does not have an absolute right to convert to chapter 13. NABT's support is important because this Court's decision will affect the ability of trustees throughout the country to effectively administer chapter 7 cases in accordance with their fiduciary mandates under the Bankruptcy Code.

Trustees are duty bound to assist in detecting and prosecuting fraudulent or abusive conduct by debtors. An absolute right to convert from chapter 7 to chapter 13 enables dishonest debtors to obstruct trustees from performing their statutory duties. Accordingly, NABT urges this Court to affirm the decision of the First Circuit Court of Appeals, holding that conversion from chapter 7 to chapter 13 should be denied in circumstances of bad faith and abuse of the bankruptcy system.

SUMMARY OF ARGUMENT

Chapter 7 trustees, as the fiduciaries responsible for the administration of all chapter 7 bankruptcy cases, are charged with preserving and promoting the system's integrity by, among other things, helping to detect fraudulent or abusive conduct. Allowing courts to refuse conversion in circumstances of bad faith ensures that the integrity of the bankruptcy system is not compromised.

Furthermore, the legislative policy of encouraging honest debtors to repay debts in chapter 13 is not constrained by the exercise of judicial discretion to deny conversion in situations where a debtor seeks to deploy § 706(a) of the Bankruptcy Code manipulatively and abusively. Indeed, to allow dishonest debtors to convert to chapter 13 on the heels of their own fraud and abuse, emasculates the Code's enforcement provisions and defeats the core bankruptcy principle that the Bankruptcy Code must not be used to further fraudulent purposes.

ARGUMENT

I. BANKRUPTCY COURTS, BANKRUPTCY TRUSTEES, AND CHAPTER 7 DEBTORS ARE ALL DUTY BOUND TO ENSURE THE INTEGRITY OF THE BANKRUPTCY SYSTEM.

The First Circuit recognizes a debtor's general good faith filing requirement as rooted in the basic bankruptcy principle that bankruptcy courts must not be used to further fraudulent purposes. *In re Coastal Cable T.V., Inc.*, 709 F.2d 762, 764-65 (1st Cir. 1983); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d. 108, 119 (3d Cir. 2004) ("...good faith requirement ensures that the Bankruptcy Code... is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy.")

In *Coastal Cable*, the First Circuit said: "A bankruptcy court, 'in the exercise of its equitable jurisdiction... has the power to sift the circumstances of

any claim to see that injustice or unfairness is not done in the administration of the bankruptcy estate.'" *In re Coastal Cable* at 764 (*citing Pepper v. Litton*, 308 U.S. 295, 304-05 (1939)). In this case, the First Circuit elaborated further on this fundamental canon of the Bankruptcy Code, stating that:

> a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims.

Marrama v. Citizens Bank of Mass. and DeGiacomo (In re Marrama), 430 F.3d 474, 477 (1st Cir. 2005), *cert. granted*, __ U.S. __, 126 S. Ct. 2859 (2006) ("*Marrama*").

Under the Bankruptcy Code, chapter 7 trustees are charged with statutory and general duties intended to preserve the integrity of the bankruptcy system and to promote the effective and efficient administration of bankruptcy cases. Among other things, the chapter 7 trustee is charged with investigating the financial affairs of the debtor, collecting and reducing to money the property of the estate and closing the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. §§ 704(a)(1), (4).

Chapter 7 debtors are also charged with various duties under § 521 of the Bankruptcy Code, likewise

designed to ensure the system's integrity and efficiency. These include the duty to file schedules of assets and liabilities, schedules of income and expenses, and a statement of financial affairs. 11 U.S.C. § 521(a)(1). Rule 1008 of the Federal Rules of Bankruptcy Procedure requires that debtors file these schedules and statements under the pains and penalties of perjury. Fed. R. Bankr. P. 1008.

A debtor's statutory mandate to file complete and truthful schedules and statements ensures the proper administration of a bankruptcy case, and compliance is essential to maintaining the underlying integrity of the bankruptcy process. *See Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987); *In re Rolland*, 317 B.R. 402, 746 (Bankr. C.D. Cal. 2004); *Schecter v. Hansen (In re Hansen)*, 325 B.R. 746 (Bankr. N.D. Ill. 2005). Furthermore, debtors are specifically required by § 521(a)(3) of the Bankruptcy Code to cooperate with chapter 7 trustees in the administration of the bankruptcy estate.

Inasmuch as trustees often administer over one thousand cases each year, they rely on debtors to perform their § 521 duties without the need to dig for the truth and conduct independent investigations to get to the facts. *See Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992). As the Seventh Circuit articulated over twenty years ago: "If debtors could omit assets at will, with the only penalty that they had to file an amended claim [or convert] once caught, cheating would be altogether too attractive." *Payne v. Wood*, 775 F.2d 202, 206 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986).

Another keystone of the bankruptcy system is the "fresh start" policy, which affords chapter 7 debtors who provide full and accurate information and cooperate with the trustee in the bankruptcy process a full or partial discharge of their debts. *See In re Hansen*, 325 B.R. at 757. Debtors are granted this fresh start in exchange for their "honest and forthright invocation" of the Bankruptcy Code's protections. *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149 (4th Cir. 1994). Hence, as a condition precedent to invoking the privileges and protections afforded by bankruptcy, debtors must abide by their statutory duties under § 521 of the Bankruptcy Code.

Judicial pronouncements on the importance of debtors' utmost compliance with their statutory duties are plentiful. *Id.; see, e.g., In re Colvin*, 288 B.R. 477, 479-81 (Bankr. E.D. Mich. 2003) (citations omitted); *In re Rolland*, 317 B.R. 402, 413-414 (Bankr. C.D. Cal. 2004) (citations omitted); *In re Robinson*, 292 B.R. 599, 607-08 (Bankr. S.D. Ohio 2003) (citations omitted); *Job v. Calder (In re Calder)*, 93 B.R. 734, 738 (Bankr. D. Utah 1988), *aff'd*, 907 F.2d 953 (10th Cir. 1990) *citing Chalik v. Moorland (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984). As such, good faith reporting is essential to the administration of chapter 7 cases, and vital to maintaining the system's integrity. *In re Rolland*, 317 B.R. 402 (Bankr. C.D. Cal. 2004); *see Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001); *In re Kestell*, 99 F.3d at 149.

The duties of chapter 7 trustees are numerous, and unique to their primary role of protecting the interests of creditors, while at the same time shepherding honest debtors through the bankruptcy

process toward the fresh start that many desperately need. The position advanced by the National Association of Consumer Bankruptcy Attorneys ("NACBA"), *Amicus Curiae* for Petitioner, in comparing the duties of chapter 7 trustees with chapter 13 trustees, is unpersuasive. NACBA summarily states that a chapter 13 trustee would have the "same duties of financial investigation and protection of estate value" as a chapter 7 trustee. (Br. of Nat'l Ass'n of Consumer Bankr. Atty's at 5). This view does not comport with the realities of bankruptcy practice.

Section 704(a)(1) of the Bankruptcy Code provides that a chapter 7 trustee must collect and reduce to money property of the estate, and close a case expeditiously. This is not included in § 1302(b) as a chapter 13 trustee's duty, because in chapter 13, it is the debtor, and not the trustee, who controls all property of the bankruptcy estate. This distinction is critical, and supports the position that a bankruptcy court has the power to deny a chapter 7 debtor who has acted in bad faith the opportunity to convert to chapter 13 - as conversion would place this dishonest debtor in full possession and control of the very assets he intentionally misrepresented or sought to conceal.

Chapter 7 trustees bring myriad recovery actions for the benefit of the bankruptcy estate, including preferential transfers pursuant to § 547,[2] fraudulent transfers pursuant to § 548,[3] unauthorized

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[2] 11 U.S.C. § 547.

[3] 11 U.S.C. § 548.

postpetition transfers pursuant to § 550,[4] and various other actions utilizing the trustee's strong arm powers contained in § 544 of the Bankruptcy Code.[5] Chapter 13 trustees, while statutorily allowed to bring such actions, rarely have the incentive, or the means, to do so.[6] Perhaps most importantly, chapter 7 trustees have the duty and authority to bring an action to deny a debtor's discharge pursuant to § 727 for various forms of fraud and bad faith conduct[7] - there is no comparable duty or authority for a chapter 13 trustee.

In the course of executing their duties, chapter 7 trustees are often in the best position to initially identify fraud, which forms the basis for seeking denial of a debtor's discharge pursuant to § 727 of the Bankruptcy Code. *See Handbook for Chapter 7 Trustees*, U.S. Dept. of J., Exec. Off. of U.S. Trustee, March 2001, 8-44, 8-45; 11 U.S.C. § 727. In doing so, chapter 7 trustees establish practices and procedures for identifying fraud - often nondisclosure or undervaluation of assets intentionally concealed or

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[4] 11 U.S.C. § 550.

[5] 11 U.S.C. § 544.

[6] Standing to bring these actions in chapter 13 cases is presently a matter of some controversy in the courts, with many bankruptcy and appellate courts acknowledging the practical necessity of finding that debtors have standing to exercise the avoidance powers of a trustee, based on the realities of bankruptcy practice and the chapter 13 trustee's lack of incentive to bring such actions. *See Ryker v. Current (In re Ryker)*, 301 B.R. 156, 161 (D. N.J. 2003); *see also Getsey v. Eiler (In re Cohen)*, 305 B.R. 886, 894 (BAP 9th Cir. 2004) (noting limited role of chapter 13 trustee).

[7] 11 U.S.C. § 727.

misrepresented by debtors - in furtherance of their primary duty to act in the best interest of creditors of the debtor's bankruptcy estate. *See Handbook for Chapter 7 Trustees*, 8-44, 8-45.

The investigatory stance of chapter 7 trustees, coupled with their recovery, avoidance and strong arm powers enumerated above, are critical compliance and enforcement mechanisms under the Bankruptcy Code. To allow conversion on the heels of an investigation that uncovers hidden assets and prompts a recovery or enforcement action by the trustee, undermines and emasculates the role of the trustee in the Code's compliance regime, and thereby renders the system ineffective.

Petitioner and NACBA unduly emphasize and place unwarranted significance on certain language in the legislative history of § 706(a) of the Bankruptcy Code.[8] Their arguments fail to recognize that a debtor seeking conversion in direct response to a trustee's investigation and recovery or enforcement action does not seek conversion for the stated legislative purpose of repaying creditors. On the contrary, these debtors seek conversion to avoid the ramifications of their unlawful, bad faith conduct which prompted action by the chapter 7 trustee.

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[8] 11 U.S.C. § 706; *see* S.Rep. No. 95-989 at 94 (1978), *reprinted in* 1978 U.S.C.A.A.N. 5787, 5880; *see also* H.R. Rep. No. 95-595, at 380 (1977), *reprinted in* 1978 U.S.C.A.A.N. 5963, 6336 ("The policy of the provision is that the debtor should always be given the opportunity to repay his debts.")

Likewise, it is disingenuous to suggest that funds that would be recovered by a chapter 7 trustee's avoidance of a fraudulent transfer would readily be surrendered by a dishonest debtor for repayment to creditors in a chapter 13 case. And it is unlikely that a debtor fleeing from a trustee's objection to an ill-claimed exemption in an intentionally undervalued asset would voluntarily submit that asset to liquidation and distribution in chapter 13. It is more likely, and indeed often the case, that the debtor would convert to chapter 13 but fail to file a plan or otherwise comply with chapter 13 procedures, and the case would be dismissed. The debtor could then file another chapter 7 petition at a later date, with a new chapter 7 trustee appointed, having let a statute of limitations run, or taken other steps to evade the basis for the original trustee's objection.

In the present case, the First Circuit Court of Appeals conducted its analysis of whether a chapter 7 debtor who engages in bad faith conduct has an absolute right to convert to chapter 13, in context of a bankruptcy court's paramount duty to adhere to the purposes of the Bankruptcy Code and curb abuse and manipulation of its provisions by debtors. *See Marrama*, 430 F.3d at 477 *(citing United States v. Mourad*, 289 F.3d 174, 178 (1st Cir. 2002), *cert. denied*, 537 U.S. 933 (2002). Section 105(a), the Bankruptcy Code's anti-abuse provision, enables a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Accordingly, the bankruptcy court is statutorily vested with broad, discretionary power to take action or to make any determination it deems

necessary or appropriate to prevent abuse of the bankruptcy process.

Moreover, a bankruptcy court is duty bound to invoke its equitable powers under § 105 whenever dishonest debtors act abusively and the integrity of the bankruptcy system is thereby threatened. This enforcement mechanism ensures that the bankruptcy court, as the court of first impression, has the means to curb abuse of its court and provide all participants in the bankruptcy system with an honest, stable process. Accordingly, the First Circuit correctly observed that the duty of the bankruptcy court to curb abuse under § 105(a) "looms large" in an analysis of whether the language of § 706(a) affords a bankruptcy court the discretion to deny conversion from chapter 7 to chapter 13 when facing a patently abusive motion to convert. *Marrama*, 430 F.3d at 477.

II. SECTION 706(a) OF THE BANKRUPTCY CODE IS UNAMBIGUOUS AND AFFORDS DEBTORS ONLY A LIMITED RIGHT TO CONVERT A CHAPTER 7 BANKRUPTCY CASE TO A CHAPTER 13 CASE.

A. The Language of § 706(a) of the Bankruptcy Code is Clear on its Face, and Does Not Afford Debtors an Absolute Right to Convert to Chapter 13.

Section 706(a) of the Bankruptcy Code provides that a debtor "may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208 or 1307 of this title. Any waiver of the right

to convert a case under this subsection is unenforceable." 11 U.S.C. § 706(a).

In this case, the First Circuit Court of Appeals affirmed the decisions of the Massachusetts Bankruptcy Court and the Bankruptcy Appellate Panel for the First Circuit, recognizing that a debtor's right to convert under § 706(a) of the Bankruptcy Code is restrained by the bankruptcy court's discretion to deny conversion in circumstances of bad faith conduct by the debtor. *See Marrama*, 430 F.3d at 481. The First Circuit commenced its analysis of the terms of § 706(a) by stressing the utmost importance of preserving the core principle of maintaining the system's integrity, and the bankruptcy court's power and duty under § 105(a) to advance that principle. The Court continued its analysis, mindful of this paramount preservation mandate.

It is well-settled that if the plain language of a statute resolves an interpretive issue, its manifest meaning must control. *See In re BankVest Capital Corp.*, 360 F.3d 291, 297 (1st Cir.), *cert. denied*, 542 U.S. 919 (2004). Utilizing plain language analysis, the First Circuit found that the plain meaning of this subsection resolved the issue before it:

> Turning to the particular language utilized in subsection 706(a), we can discern no evidence that Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of

> the bankruptcy process at any stage in the bankruptcy proceedings.

Marrama, 430 F.3d at 478.

Courts interpret the meaning of a statute by first assuming that the words used in the statute comport with ordinary meaning and accurately express legislative intent. *See Laaman v. Warden, New Hampshire State Prison*, 238 F.3d 14, 16 (1st Cir. 2001). The language of § 706(a) indicates judicial discretion, and contains two distinct protections against judicial or other encroachment upon the debtor's qualified right to convert. Neither of these stated protections describes the right to convert as absolute.

Section 706(a) provides that the debtor "may" convert his case at "any time." The First Circuit found the use of the word "may," which signifies conditionality, instead of the more imperative term "shall," to be a compelling distinction. The Court noted that the use of the word "shall" in other sections of the Bankruptcy Code, such as § 1307(b),[9] demonstrates that the drafters knew how to use statutory language that confers little to no discretion on the bankruptcy court, and chose not to use such compulsory language in § 706(a). Accordingly, the Court held that the word "may" indicates the existence of a privilege, rather than an absolute right, reserving discretion in the bankruptcy court to deny conversion in certain circumstances. *See Marrama*, 430 F.3d at 477-78 (*citing Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 346 (1st Cir. 2004)) ("Congress' use

[9] 11 U.S.C. § 1307(b).

of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight.").

NACBA suggests that the word "may" connotes discretion, and argues that use of the word in § 706(a) means that Congress has granted the debtor a permissive right to convert his chapter 7 case at his own discretion. (Br. of Nat'l Ass'n of Consumer Bankr. Atty's at 8). As the First Circuit aptly points out, however, "may" often suggests conditionality, signifying that a debtor might normally succeed in an attempted conversion, but not necessarily in all circumstances. Under this reading, "may" still connotes discretion, but the discretion is held by the court and not the debtor. This reading of the word "may" is bolstered by a comparison to other sections of the Bankruptcy Code that use the word "shall" to expressly eliminate the bankruptcy court's discretion. *See Marrama*, 430 F.3d at 478, *see also In re Marcakis*, 254 B.R. 77, 82 (Bankr. E.D. N.Y. 2000) ("simply put, 'shall' means 'must,' something mandatory, and 'may' connotes the permissive, the possible").

The First Circuit similarly found that the phrase "at any time" merely suggests that conversion is not subject to temporal restrictions. The phrase, by its ordinary meaning, does not grant debtors broad permission to convert because "at any time" simply does not mean "regardless of the circumstances." *See Marrama*, 430 F.3d at 479; *see also Copper v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005); *In re Starkey*, 179 B.R. 687, 692 (Bankr. N.D. Okla. 1995).

In correlation, Rule 1009 of the Federal Rules of Bankruptcy Procedure similarly provides that a debtor "may" amend a voluntary petition, list, schedule or statement "at any time" before the case is closed. Fed. R. Bankr. P. 1009. Judicial interpretation of this same quoted language in context of a debtor's asserted "absolute" right to amend exemptions is instructive. This same language has consistently been interpreted as allowing courts discretion to deny amendments to exemptions where the debtor has acted in bad faith by concealing or undervaluing assets, or where the debtor's concealment and delay in seeking amendment unfairly prejudices creditors. *See Ladd v. Ries (In re Ladd)*, 450 F.3d 751, 755 (8th Cir. 2006); *Hannigan v. White (In re Hannigan)*, 409 F.3d 480, 481-82 (1st Cir. 2005); *In re Rolland*, 317 B.R. 402, 414 (Bankr. C.D. Cal. 2004). These cases further illustrate that bankruptcy courts are loathe to grant absolute rights and privileges to debtors who intentionally conceal or undervalue assets, further supporting the First Circuit's interpretation of § 706.

The second sentence in § 706(a) provides that "any waiver of the right to convert is unenforceable." The First Circuit correctly interpreted this phrase as a consumer protection provision against contracts of adhesion, rejecting the Petitioner's argument that the language means a debtor cannot be divested of the right to convert even where the outcome of conversion is to shield the debtor from his own willful misconduct and abuse. *See Marrama*, 430 F.3d at 479.

Therefore, the two explicit protections stated in § 706(a) are limited by the language of the section itself.

While § 706(a) contains these explicit protections of the debtor's right to convert, it does *not* state that the right is absolute. If Congress intended the debtor's right to convert to be absolute, the statutory language would so provide. The First Circuit accordingly found that the plain language of § 706(a) is consistent with the bankruptcy court's presumptive authority to take such steps as it deems necessary to thwart abuse of the bankruptcy process, including denial of conversion from chapter 7 to chapter 13 in instances of bad faith conduct by the debtor. *See Marrama*, 430 F.3d at 480.

Most appellate courts reviewing this issue agree that the *language* of § 706(a) does not grant debtors an absolute right to convert. *See In re Copper*, 426 F.3d 810; *In re Matter of Martin*, 880 F.2d 857 (5th Cir. 1989) (recognizing that the language of § 706(a) seems to qualify the right to convert with an extreme circumstances exception); *In re Finney*, 992 F.2d 43 (4th Cir. 1993) (declining to rule on whether the right to convert under § 706(a) is absolute); *In re Young*, 237 F.3d 1168 (10th Cir. 2001) (declining to discuss the plain meaning of § 706(a)); *see also In re Brown*, 239 B.R. 865, 871 (Bankr. W.D. Mich. 2003); *In re Ponzini*, 277 B.R. 399, 404 (Bankr. E.D. Ark 2002) ("recent rulings on this issue reveal a large number of courts adopting what was previously referred to as the minority view"). *But see In re Miller*, 303 B.R. 471 (BAP 10th Cir. 2003) (finding right of conversion to be absolute based on the statutory language of § 706(a)).

B. The Legislative History of § 706(a) as a Whole, Supports Limiting the Right to Convert to Honest Debtors.

When the meaning of a statute is clear and unambiguous on its face, courts must not look beyond the statute's text to examine the relevant legislative history. *See In re Weinstein*, 272 F.3d 39, 43 (1st Cir. 2001) *(citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 10 (2000)). The First Circuit determined it was nevertheless appropriate to examine the legislative history in this case, in light of controversy among the various bankruptcy and appellate courts in interpreting § 706(a).

The legislative history in support of § 706(a) describes the debtor's right to convert as "absolute."[10] This language is cited and relied upon by Petitioner and NACBA in their arguments, and is cited in cases holding that a bankruptcy court lacks the discretion to deny a debtor's conversion from chapter 7 to 13. In response to these arguments, the First Circuit determined that the term "absolute" cannot be taken out of context, and that the collective language of § 706(a) and § 105 clearly indicates that conditions exist that could defeat the debtor's motion to convert. *See Marrama*, 430 F.3d at 480.

The First Circuit reasoned that while the pronounced policy of § 706(a) is that a debtor always be given an opportunity to repay his debts, implicit in this policy is that this opportunity is available only to *honest* debtors:

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[10] *See* S. Rep. No. 95-989, at 94; *see also supra* note 2.

> Nothing in the legislative history remotely negates nor undermines the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code.

Id.

The First Circuit reviewed the bankruptcy court's assessment of the facts for clear error, with reference to the "totality of circumstances" approach. Under this approach, a court reviews various factors to determine whether the particular circumstances are sufficiently egregious to warrant a finding of bad faith and denial of conversion to chapter 13. *See Marrama*, 430 F.3d at 482; *see also Sullivan v. Solimani (In re Sullivan)*, 326 B.R. 204 (BAP 1st Cir. 2005); *see also Cabral v. Shamban (In re Cabral)*, 285 B.R. 563 (BAP 1st Cir. 2002).

Factors utilized by some courts in examining the totality of circumstances in the chapter 7 to 13 conversion context include: (1) the debtor's accuracy in stating debts and expenses; (2) the debtor's honesty in the bankruptcy process, including whether he or she has attempted to mislead the court or has made misrepresentations; (3) whether the Bankruptcy Code is being unfairly manipulated; and (4) the debtor's motivation in seeking chapter 13 relief. *See Marrama*,

430 F.3d at 482; *In re Sullivan*, 326 B.R. at 212; *see also In re Cabral*, 285 B.R. at 573.

Reviewing the record before it, the First Circuit upheld the finding of the bankruptcy court that the Petitioner's conduct, including his failure to disclose assets and prepetition transfers of property on his schedules, and misrepresentation of the value of vacation property placed in trust shortly before the filing of the petition, constituted bad faith. Accordingly, the Court correctly affirmed that the bankruptcy court acted within its discretion in denying the debtor's motion to convert to chapter 13. *See Marrama* at 481-83.

III. THE BANKRUPTCY CODE DOES NOT AFFORD ABSOLUTE RIGHTS OR PRIVILEGES TO DEBTORS WHO ACT IN BAD FAITH AND ABUSE THE BANKRUPTCY SYSTEM.

The First Circuit correctly framed the issue in this case as whether a chapter 7 debtor has an "absolute" right to convert to chapter 13, and then held that both the terms of the statute and the policies contained in the legislative history dictate that a debtor does not. *See Marrama*, 430 F.3d at 477. Two weeks previous, the Sixth Circuit Court of Appeals similarly held that a chapter 7 debtor's motion to convert to chapter 13 could and should be denied in the absence of the debtor's good faith. *See Copper v. Copper (In re Copper)* 426 F.3d 810, 816 (6th Cir. 2005)(quoting at length and adopting the position of the Sixth Circuit

Bankruptcy Appellate Panel contained in *In re Copper*, 314 B.R. 628 (BAP 6th Cir. 2004)).

In *Copper*, the Sixth Circuit Court of Appeals based its holding on: (1) the similar logic in a court's ability to dismiss a chapter 13 case as filed in bad faith; (2) § 706(a)'s use of the word "may" instead of "shall"; (3) inconsistencies contained in the legislative history; and (4) the common sense notion that a bankruptcy court should have the authority to police the integrity of its proceedings. *See In re Copper*, 426 F.3d at 817.

The *Copper* Court found that legislative history purporting to suggest a one-time absolute right to convert cannot be implemented without looking at the policy behind that right, (as stated in the same legislative history), which is to give debtors an opportunity to repay their debts. The Sixth Circuit observed that where a debtor seeks conversion not for the opportunity to repay debts, but instead to abuse the bankruptcy system and thwart attempts to collect assets, allowing conversion "turns on its head the policy reason for providing a debtor with such a right." *See Id.* (*citing In re Copper*, 314 B.R. at 634-47).

Similarly, the First Circuit expressly acknowledged the general policy that a debtor should be given a chance to effectuate a chapter 13 plan. However, it further noted that it is "plainly implicit in this legislative observation . . . that such an opportunity is to be accorded only to *honest* debtors." *See Marrama*, 430 F.3d at 480 (emphasis in original).

Unfortunately, but in relatively few instances, a debtor's motivation in seeking conversion is not to repay creditors. Rather, it is to utilize § 706(a) manipulatively, abusively, in bad faith, or under gross inequities. Therefore, if the impetus for the policy fails to exist in a particular case, then so should the policy itself. *See In re Spencer*, 137 B.R. 506, 512 (Bankr. N.D. Okla. 1992), *citing In re Marcakis*, 254 B.R. 77, 81 (Bankr. E.D. N.Y. 2000); *see also Kuntz v. Shambam (In re Kuntz)*, 233 B.R. 580, 583 (BAP 1st Cir. 1999).

Accordingly, while the legislative history underscores the importance of giving debtors the opportunity to repay debts, this opportunity does not rise to the level of an absolute right or privilege. Rather, the circuit courts in *Copper* and *Marrama* would restrain a debtor's right to convert only where denial of conversion does not offend the policy of § 706. On the contrary, and out of necessity, in order to advance the fundamental principle that bankruptcy courts must not be used to further fraudulent purposes, courts adhering to the *Copper* and *Marrama* reasoning have barred motions under § 706 only where the motivation for conversion contravenes basic bankruptcy policy.

As such, cases where conversion has been denied include instances where debtors: (1) fail to disclose assets; (2) file inaccurate schedules and statements, falsify documents, or testify falsely in bankruptcy proceedings; (3) convert to prevent the sale of assets or to impact pending litigation; and (4) otherwise impede the administration of the case and the liquidation of assets. *See, e.g., Martin v. Cox*, 213 B.R. 571 (E.D. Ark. 1996), *aff'd*, 116 F.3d 480 (8th Cir.

1997); *In re Cabral*, B.R. at 575; *In re Brown*, 293 B.R. 865 (Bankr. W.D. Mich. 2003); *In re Carter*, 285 B.R. 61, 65 (Bankr. N.D. Ga. 2002); *In re Gallagher*, 283 B.R. 604 (Bankr. M.D. Fla. 2002); *In re Ponzini*, 277 B.R. 399 (Bankr. E.D. Ark 2002); *In re Porter*, 276 B.R. 32 (Bankr. D. Mass. 2002); *In re Johnson*, 262 B.R. 75, 79 (Bankr. E.D. Ark. 2001); *In re Thornton*, 203 B. R. 648 (Bankr. S.D. Ohio 1996).

These bad faith conversion cases in all instances revolve around a dishonest and manipulative debtor who seeks conversion to escape from the perils he himself has created. These are not cases involving honest mistakes or inadvertent omissions by debtors. Instead, the debtors' conduct in these cases present extreme circumstances of fraud or abuse, which rise to the level of bad faith. Therefore, under the *Copper* and *Marrama* rationale, conversion from chapter 7 to chapter 13 would only be denied in those rare instances where a dishonest debtor seeks to abuse and manipulate the process to further his own fraudulent purposes.

Case law in other areas where bad faith conduct by debtors is denounced by bankruptcy courts demonstrates that denial of conversion is only one of the ramifications of bad faith conduct. For example, while exemptions are liberally construed under the Bankruptcy Code,[11] and amendments to schedules are

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[11] *See Wilder v. Inter-Island Stream Nav. Co.*, 211 U.S. 239, 29 S. Ct. 53 (1908); *In re Caron*, 82 F.3d 7 (1st Cir. 1996); *In re Nguyen*, 211 F.3d 105 (4th Cir. 2000).

freely allowed,[12] a debtor who intentionally fails to file accurate schedules and statements and is found to be acting in bad faith may forfeit assets ordinary protected by the exemption provisions of the Bankruptcy Code. *See In re Rolland*, 317 B.R. 402, 413-14 (Bankr. C.D. Cal. 2004).

To illustrate, the First Circuit recently upheld the bankruptcy court's denial of the debtors' amendment to their schedules seeking to increase the value of their homestead exemption, as a sanction for intentionally concealing a 34 acre "back parcel" and undervaluing their residence (including this back parcel), on their schedules. *See Hannigan v. White (In re Hannigan)*, 409 F.3d 480, 483 (1st Cir. 2005). More remarkable, in *In re Rolland*, 317 B.R. at 414-16, the California Bankruptcy Court denied the debtors' amendment to increase their homestead exemption where the debtors intentionally undervalued their residence in their schedules, filed numerous amendments in response to the trustee's nine continued meetings of creditors where discrepancies in the debtor's schedules were belatedy revealed, and then sabotaged the chapter 7 trustee's efforts to sell the property by employing such "scorched earth" tactics as obstructing access to prospective buyers, uprooting signage, posting home defects and crime statistics, and presenting an appearance of disorder and neglect.

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[12] Rule 1009 of the Federal Rules of Bankruptcy Procedure provides that a debtor "may" amend a voluntary petition, list, schedule or statement "at any time" before the case is closed. Fed. R. Bankr. P. 1009. *See* discussion *supra* under Argument II(A), noting the same discretionary language in used both § 706(a) of the Bankruptcy Code and Bankruptcy Rule 1009.

Similarly, post-petition bad faith conduct by the debtor, such as concealment or conversion of estate assets or failure to turn over property of the estate to the chapter 7 trustee, may cause a bankruptcy court to invoke its equitable powers pursuant to § 105(a) and "surcharge" a debtor's exempt property. *See Latman v. Burdette*, 366 F.3d 774, 786 (9th Cir. 2004); *In re Koss*, 319 B.R. 319, 323 (Bankr. D. Mass. 2005); *In re Karl*, 313 B.R. 827, 831 (Bankr. W.D. Mo. 2004). Consistent in all these cases is the bankruptcy court's refusal to enable debtors to invoke the Bankruptcy Code in bad faith for the purpose of manipulating and abusing the bankruptcy system, while simultaneously enjoying its benefits and protections.

Under the totality of circumstances approach articulated in *Copper* and *Marrama*, debtors *who abide by the basic bankruptcy principle that courts must not be used to further fraudulent purposes*, and are otherwise eligible,[13] encounter no difficulty in converting to chapter 13 in order to repay their debts, as encouraged by the underlying policy of § 706(a). Indeed, this category encompasses the vast majority of debtors. Excluded are only those few unscrupulous, dishonest debtors who seek to use the bankruptcy process to thwart and defraud creditors rather than attempt to repay them to the best of their ability.

For example, in one recent case the bankruptcy court denied a chapter 7 debtor's motion to convert to chapter 13, finding that the motion was not motivated

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[13] *See* 11 U.S.C. § 706(d) (to convert under § 706(a) the debtor must be eligible for relief under chapter 13 as set forth in 11 U.S.C. § 109(e)).

by the debtor's desire to repay debts, but was merely the debtor's latest attempt to manipulate the bankruptcy process and avoid the sale of certain real property by the chapter 7 trustee. *See In re Brown*, 293 B.R. 865, 871 (Bankr. W.D. Mich. 2003). In the course of his chapter 7 case, the debtor had undervalued his property on his schedules, failed to timely pay his filing fee, repeatedly failed to appear at rescheduled meetings of creditors, refused to testify when he did appear, and denied the trustee and prospective purchasers access to the property despite court orders compelling him to do so. *See id.* at 867-68. The debtor filed a motion to convert to chapter 13 only after the trustee sought and received permission to sell the subject property.

The *Brown* Court refused to apply § 706(a) in a "restrictive and rigid manner," finding instead that a debtor's request to convert should be granted in "all but the most egregious circumstances." *See In re Brown*, 293 B.R. at 869; *see also In re Wampler*, 302 B.R. 601, 606 (Bankr. S.D. Ind. 2003) (conversion denied on objection of chapter 7 trustee following debtor's failure to turn over funds obtained from recovery of non-exempt lawsuit); *In re Porter*, 276 B.R. 32, 37-38 (Bankr. D. Mass. 2002) (conversion denied on objection of chapter 7 trustee following trustee's discovery of pre-petition transfer of assets to family members not disclosed in schedules).

In addition to sanctioning bad faith conduct by dishonest debtors, allowing bankruptcy courts limited discretion to deny a debtor's motion to convert increases overall coherence of the Bankruptcy Code. A

motion to convert a chapter 7 case to chapter 13 under § 706(a) amounts to the debtor filing anew in chapter 13. *In re Brown*, 293 B.R. at 870. It is well settled that a debtor cannot file a chapter 13 petition in bad faith. As the First Circuit points out - a bankruptcy court has "unquestioned authority" to dismiss a chapter 13 case based upon a showing of a debtor's bad faith. *Marrama* 430 F.3d at 479 (*citing, inter alia, In re Alt*, 305 F.3d 413, 418-19 (6th Cir. 2002); *see also In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992); *In re Cabral*, 285 B.R. at 575. Hence, "[i]f a chapter 13 petition may be dismissed for lack of good faith, it is logical to conclude that conversion from chapter 7 to chapter 13 may also be denied in the absence of good faith." *In re Brown*, 293 B.R. at 870 *(citing Alt. v. United States (In re Alt)*, 305 F.3d 413 (6th Cir. 2002)).

Even those courts finding an absolute right to convert under § 706(a), recognize that once the debtor has converted to chapter 13, a bankruptcy court may *sua sponte* reconvert the debtor's case to chapter 7 for lack of good faith. *See* 11 U.S.C. § 1307(c); *Croston v. Davis (In re Croston)*, 313 B.R. 447, 453 (BAP 9th Cir. 2004); *In re Cabral*, 285 B.R. at 572. These cases, while achieving the proper outcome, do so by acquiescing to the notion that even dishonest debtors who abuse the system have a right to become, albeit momentarily, debtors in possession of the assets they fraudulently misrepresent or conceal.

The requirement that a chapter 13 petition be filed in good faith is now explicit in the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

("BAPCPA"). BAPCPA amended § 1325, by adding subsection (a)(7), providing that plan confirmation is dependent upon whether "the action of the debtor in filing the petition was in good faith." 11 U.S.C. § 1325(a)(7). While the debtor in the instant case is not subject to the provisions of BAPCPA, today, upon a finding of bad faith, the debtor would not be eligible for chapter 13, and therefore would not meet the express requirements for conversion in § 706(a). *See In re Hall*, 346 B.R. 420 (Bankr. W.D. Ky. 2006) (pursuant to amended Bankruptcy Code, a bankruptcy court can either dismiss case or deny confirmation of proposed plan if it finds that the debtor's petition was filed in bad faith).

In fact, both the Petitioner and NACBA acknowledge that a case in which a debtor acts in bad faith is subject to dismissal or reconversion to chapter 7 pursuant to § 1307 at the bankruptcy court's discretion. (Br. of Nat'l Ass'n of Consumer Bankr. Atty's at 18; Br. of Pet. at 23-24); *see* 11 U.S.C. § 1307. NACBA suggests that giving a bankruptcy court similar discretion to deny conversion would amount to a duplicative remedy. This is not the case, as the First Circuit Court of Appeals articulates. First, it hardly promotes efficient administration or use of judicial resources to force a court faced with patently bad faith conduct to allow a conversion, only to reconvert or dismiss that same case due to precisely the same conduct. Moreover, these two sections are not duplicative, as bad faith justifying dismissal of a converted case can occur post-conversion, as well as pre-conversion. *See Marrama*, 430 F.3d at 481; *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1145 (1st Cir. 1992).

NACBA further suggests that creditors are sufficiently protected by the "best interest of creditors' test,"[14] which precludes confirmation unless creditors receive at least as much as they would in a chapter 7 case, and also by the presence of the chapter 13 trustee. (Br. of Nat'l Ass'n of Consumer Bankr. Atty's at 18). As argued earlier, and contrary to NACBA's assertions, the chapter 13 trustee does not exercise the same powers of financial investigation and oversight as the chapter 7 trustee. Also, delaying reconversion to chapter 7 until confirmation wastes the time and resources of the court and creditors, and does not address the overarching issues of bad faith and abuse of the bankruptcy process. This abuse includes the debtor's potential inactivity intended to prompt a dismissal, thereby evading the chapter 7 trustee's pursuit of a recovery or enforcement action, and then awaiting the expiration of a statute of limitations, or taking other evasive action, before filing another bankruptcy petition.

While bankruptcy offers a fresh start to those individuals who genuinely need it, this opportunity does not include the right to ignore the duties and obligations inherent in the bankruptcy process. *United States v. Thomas*, 342 B.R. 758, 762 (S.D. Tex. 2005). Both policy and coherence of the Bankruptcy Code favor the stance that a debtor's right to convert under § 706(a), while compelling, is not absolute. As shown, both the language of § 706(a) and its legislative history substantiates this interpretation. Indeed, the most fundamental bankruptcy policy itself dictates that there

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[14] 11 U.S.C. § 1325(a)(4).

are no absolute rights or privileges afforded to those who manipulate and abuse the bankruptcy system.

CONCLUSION

The Bankruptcy Code's provision for discharging debts and providing a fresh start to debtors is not the equivalent of an absolute right. Instead, it is a privilege reserved for those honest but unfortunate debtors who provide candid and complete disclosures and cooperate within the bankruptcy system. *See In re Hansen*, 325 B.R. at 757; *see also Grogan v. Garner*, 498 U.S. 279, 287 (1991).

In situations where debtors exhibit bad faith and disregard their statutory mandate of complete and accurate disclosures and cooperation with the chapter 7 trustee in the administration of the case, bankruptcy courts are obligated to restrict privileges and protections ordinarily available to honest debtors. To comply with this duty, bankruptcy courts are empowered under § 706(a) and § 105(a) of the Bankruptcy Code to take reasonable steps to prevent such abuse and manipulation of the bankruptcy process, including the ability to deny conversion from chapter 7 to chapter 13.

Based on the foregoing, the National Association of Bankruptcy Trustees, as *Amicus Curiae* in support of Respondent, Mark G. DeGiacomo, Chapter 7 Trustee, respectfully requests that the decision of the First Circuit Court of Appeals be affirmed.

Respectfully submitted,

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No. 05-996

IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS AND MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

ROBERT LOUIS MARRAMA,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS AND
MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Amicus curiae National Association of Consumer Bankruptcy Attorneys respectfully submits this brief in support of petitioner.[1]

The plain language of 11 U.S.C. § 706(a) grants the debtor an unqualified one-time right to convert a chapter 7 bankruptcy case to chapter 13. The question presented in this case is whether, notwithstanding this clear statutory language, a court may nevertheless prevent a debtor from converting his case from chapter 7 to chapter 13 on account of prior bad faith. While bankruptcy courts are by no means powerless to root out "bad faith" misuses of the bankruptcy process, the text of the statute does not permit the court to prevent a debtor from exercising this one-time right to convert a case—a right that Congress has unambiguously con-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus curiae*, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Blanket consent for the filing of *amicus* briefs has been lodged with the Clerk of the Court by both parties.

ferred. The judgment below affirming the bankruptcy court's denial of a motion to convert should therefore be reversed.

INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Bankruptcy Attorneys ("NACBA"), incorporated in 1992, is a non-profit organization of more than 3,100 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates nationally on issues that cannot adequately be addressed by individual member attorneys. NACBA has filed several *amicus curiae* briefs in this Court in cases involving the rights of consumer bankruptcy debtors. *See, e.g., Till* v. *SCS Credit Corp.*, 541 U.S. 465 (2004); *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004); *Lamie* v. *United States Tr.*, 540 U.S. 526 (2004); *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998). NACBA also participated as *amicus* in this case below.

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individual low- and moderate-income wage earners. In many instances, these individuals file voluntary cases under chapter 7 in order to discharge their debts and obtain a fresh start. For a variety of reasons, some of these debtors later elect to repay some or all of their debts by exercising the right to convert their cases to chapter 13 pursuant to 11 U.S.C. § 706(a)—the provision at issue in this case. In doing so, debtors represented by NACBA members are doing nothing more than exercising the rights that Congress granted to them in the clearest possible terms.

STATUTORY PROVISIONS

11 U.S.C. § 706(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this ti-

> tle at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

STATUTORY BACKGROUND

The Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, provides two sets of procedures through which debtors can obtain bankruptcy protection: liquidation, which generally proceeds under chapter 7; and reorganization, which is governed by chapters 11, 12, and 13.[2] The three reorganization chapters are similar in structure, and their variances are explained by the different types of debtors for which they were each intended.[3]

The choice that most debtors in bankruptcy face is thus between liquidation in chapter 7 and gradual repayment under the reorganization chapter that applies to them. This choice can be a matter of great importance and is likely to reflect the unique concerns of each particular debtor. The decision is essentially whether to keep one's assets and propose a plan for using them, together with future earnings, to pay one's creditors over time or whether to relinquish virtually all of one's assets now in exchange for a fresh start.

A. Liquidation And Reorganization

Chapter 7 provides for the liquidation of a debtor's assets, whether the debtor is an individual or a business entity.

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[2] While as a technical matter a chapter 13 bankruptcy does not provide for reorganization, "a term used exclusively in reference to chapter 11," chapter 13 "is in fact quite similar to chapter 11, with which it shares many concepts." 8 *Collier on Bankruptcy* ¶ 1300.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006). "Chapter 12 . . . in turn was modeled largely on chapter 13." *Id.*

[3] Although there are exceptions, chapter 11 generally governs corporate debt reorganization, chapter 12 provides special protections for family farms and fishermen, and chapter 13 governs reorganization of debts by individuals with steady income and moderate liabilities. *See* 11 U.S.C. § 109. *Cf. Toibb* v. *Radloff*, 501 U.S. 157 (1991) (chapter 11 primarily intended for corporate reorganizations, but individual debtor nevertheless eligible to seek chapter 11 protection under plain language of statute).

In a chapter 7 liquidation case, a trustee will be appointed whose duty it is to protect and maximize the value of the bankruptcy estate and then to reduce that property to cash for distribution to the creditors. *See* 11 U.S.C. §§ 701-704. The bankruptcy estate comprises all the debtor's assets as of the bankruptcy filing, *see id.* § 541, except that individual debtors are allowed to keep certain exempt assets, *see id.* § 522. In essence, the chapter 7 debtor turns all non-exempt property over to the trustee and, in exchange, is typically granted a discharge of pre-bankruptcy debts. *See id.* § 727. Over the course of the liquidation, the trustee will investigate the financial affairs of the debtor, *see id.* § 704(a)(4), ensure that the debtor complies with his duties in the case, *see e.g., id.* § 704(a)(3), and finally dispose of the estate's property in whatever way the trustee deems consistent with the best interests of the creditors, *id.* § 363.

Though certain categories of debt (such as debts for money obtained by fraud, debts for willful and malicious injury, etc.) are nondischargeable, *see* 11 U.S.C. § 523(a), and in some cases an individual debtor who abuses the bankruptcy process may be denied a discharge altogether, *see id.* § 727(a), in the typical case, an individual debtor will leave this process unencumbered by pre-bankruptcy debt, but with only those limited assets that the law deems exempt from the bankruptcy estate. *See Rousey* v. *Jacoway*, 544 U.S. 320, 325 (2005) (noting that exemption of certain assets from the bankruptcy estate helps to effectuate the debtor's fresh start).

While the goal of a chapter 7 proceeding is to obtain a discharge following the liquidation of the debtor's assets, the reorganization chapters seek to avoid liquidation by allowing the debtor to adopt a plan providing for the use of current assets and future income to satisfy the prepetition claims of creditors. The premise is that creditors may well be better served if the debtor can use existing assets to generate future income that is committed under a plan of reorganization to repaying the creditors. *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 454 (1999) (describing "the two recognized policies underlying

Chapter 11" as "preserving going concerns and maximizing property available to satisfy creditors"). The centerpiece of reorganization is thus the confirmation of a plan that is consistent with the manifold statutory requirements. And because the essential premise of reorganization is that forestalling liquidation can benefit the creditors, all plans are subject to the central requirement that every creditor receive at least as much under the terms of the plan as he would in a chapter 7 liquidation. *See* 11 U.S.C. §§ 1129(a)(7), 1325(a)(4).

In addition to benefiting the creditors in this way, chapter 13 reorganization provides substantial benefits for individual debtors that may induce them to reorganize rather than to liquidate. If the chapter 13 plan is confirmed by the bankruptcy court, and the debtor makes all the required payments, the debtor's remaining debts will be discharged, including certain debts that section 523(a) would render nondischargeable in a chapter 7 proceeding. *See* 11 U.S.C. §§ 1325-1326, 1328. In addition to this somewhat broader discharge, chapter 13 allows the debtor to keep those prebankruptcy assets not consumed in making the payments required by the plan. *See id.* § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."); *id.* § 1327(b)-(c).

Notwithstanding these key differences, liquidation and chapter 13 reorganization proceedings share many features. A trustee is also appointed in chapter 13, and that trustee has the same duties of financial investigation and protection of estate value as does a chapter 7 trustee. *See* 11 U.S.C. § 1302(b) (incorporating many chapter 7 powers by reference). The chapter 13 trustee has the added obligation of overseeing the debtor's repayments and advising the court and the debtor on issues related to the plan. *Id.* Although the chapter 13 debtor retains the power to control the property of the estate, a power that is given over to the trustee in chapter 7, *id.* § 1303, the debtor must generally make the same filings under both chapters and must open up his financial affairs to the same extent, *see id.* § 521 (setting forth numerous duties of the debtor, most applicable regardless of

the governing chapter); Fed. R. Bankr. P. 4002(a)(3) (requiring full disclosure of all property available to the estate).

Furthermore, in both chapter 7 and chapter 13 cases, a debtor who fails to make full and complete disclosure or who acts in bad faith risks dismissal of the bankruptcy or denial of a discharge—among the ultimate bankruptcy sanctions. *See* 11 U.S.C. §§ 707(a), 1307(c) (both allowing dismissal "for cause").[4]

B. Conversion Among Chapters

Each of the relevant chapters of the Bankruptcy Code contains a provision governing conversion to the other chapters. Each begins with substantially the same language: "The debtor may convert a case under this chapter to a case under [another chapter] at any time . . . ." 11 U.S.C. § 706(a); *see also id.* §§ 1112(a), 1208(a), 1307(a). Each of the non-corporate chapters also provides that "[a]ny waiver of the right to convert a case . . . is unenforceable." *Id.* § 706(a); *see also id.* §§ 1208(a), 1307(a) (same).

Each of these conversion provisions also provides for conversion on a motion filed by any "party in interest" in the bankruptcy case (such as a trustee, a creditor or any other entity that may be affected by the bankruptcy). 11 U.S.C. § 1109(b). In contrast to the provisions granting *the debtor* the right to convert, the party-in-interest provisions provide that "*[t]he court* may convert" the case, and only after notice and a hearing. *Id.* § 706(b) (emphasis added); *see also id.* §§ 1208(d), 1307(c). While the debtor may convert a case for any reason, conversion on a motion by another party in interest typically requires a showing of "cause." *See id.* § 1112(b)(1) ("if the movant establishes cause"); *id.* § 1208(d) ("upon a showing that the debtor has committed fraud"); *id.* § 1307(c) ("for cause").

---

[4] Because the central feature of a chapter 13 proceeding is the confirmation of a plan, failure to confirm a plan is tantamount to a dismissal of the case without a discharge. *See* 11 U.S.C. § 1307(c)(5) (allowing dismissal for failure to confirm a plan); *id.* § 1328 (predicating discharge on confirmation of a plan). Furthermore, confirmation of the plan is subject to an explicit good-faith filing requirement. *See id.* § 1325(a)(3).

The Bankruptcy Code does impose certain structural restrictions on the debtor's right to convert. Conversion to a new chapter is forbidden in all cases if the debtor is plainly ineligible for relief under that chapter. *See* 11 U.S.C. §§ 706(d), 1112(f), 1208(e), 1307(g). Debtor conversions out of chapter 7 are also limited to instances in which the case has not previously been converted. *Id.* § 706(a). And a debtor who has converted his case to chapter 13 lacks the right—enjoyed by debtors who filed under chapter 13 in the first instance—to dismiss the bankruptcy without providing other parties-in-interest with notice and the right to be heard. *Id.* §§ 1307(b), (c).

Thus, the Bankruptcy Code affords the chapter 7 debtor *one* unrestricted opportunity to convert his case to a different chapter, but severely constrains his options once he has done so. The debtor who converts once may not dismiss his case, *see* 11 U.S.C. §§ 1208(b), 1307(c), and must either proceed under his current chapter or return to chapter 7 and stay there. Such post-conversion restrictions prevent any misuse or manipulation of the initial opportunity to convert. In sum, as the legislative history makes clear, the debtor has a "*one-time* absolute right of conversion" to any chapter for which he qualifies. S. Rep. No. 95-989, at 94 (1978) (emphasis added); *see also* H.R. Rep. No. 95-595, at 380 (1977).

ARGUMENT

I. THE PLAIN MEANING OF SECTION 706(a) IS THAT THE DEBTOR IS ENTITLED TO EXERCISE A ONE-TIME RIGHT OF CONVERSION NOT SUBJECT TO JUDICIAL DISCRETION

When construing the Bankruptcy Code, just as when construing any statute, "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (quotation omitted).

It is presumed that Congress "says in a statute what it means and means in a statute what it says." *Connecticut*

Nat'l Bank v. *Germain*, 503 U.S. 249, 254 (1992). Accordingly, the plain meaning of the statutory language controls unless it yields a result so anomalous as to be "absurd." *Lamie*, 540 U.S. at 534.

A. The Word "May" In Section 706(a) Permits Conversion By The Debtor Subject Only To Those Limitations Expressly Stated In The Statute

The plain language of section 706 affords the debtor a one-time, absolute right to convert his case from chapter 7 to chapter 11, 12, or 13. Section 706(a) provides that "[t]he debtor *may* convert a case under this chapter to a case under chapter 11, 12, or 13 of this title *at any time*." 11 U.S.C. § 706(a) (emphases added). The ordinary definition of "may" is "to be allowed or permitted to." *American Heritage Dictionary of the English Language* 1112 (3d ed. 1996). *See also* 9 *Oxford English Dictionary* 501 (2d ed. 1998) (defining "may" as expressing, *inter alia*, "ability or power," and the "absence of prohibitive conditions"). As this Court has recently noted, "[t]he word 'may' customarily connotes discretion." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005). As used in section 706(a), "may" therefore means that the debtor has been granted a permissive right to convert his chapter 7 case at his own discretion.

This reading of the word "may" is consistent with the commonsense meaning of the phrase in the statute. If, for example, one neighbor tells another, "You may use my rake at any time," the ordinary understanding of this statement is that the first neighbor is granting the other neighbor permission to use the rake at the latter's discretion. Similarly, the plain meaning of "[t]he debtor may convert . . . at any time" is that Congress is granting the debtor permission to convert his bankruptcy case, at his sole discretion. If the neighbor (or Congress) had meant to condition use of the rake (or the right to convert) on the satisfaction of other conditions, the expectation is that they would have said so in granting permission to use it.

The court of appeals, however, construed the word "may" in section 706(a) as "suggest[ing] conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion." Pet. App. 34. The Sixth Circuit has interpreted "may" similarly in this context, noting that "may" can mean "might" or be "used to express possibility." *Copper* v. *Copper* (*In re Copper*), 426 F.3d 810, 816 (6th Cir. 2005) (quotation omitted). In other words, these courts have held that rather than using "may" to give the debtor the right to decide whether to convert, Congress was merely indicating the objective possibility that conversion might come to pass—"may" being used as it would in the phrase "it may rain tomorrow." *See* Pet. App. 34. ("In other words, the debtor 'may' succeed . . . but not necessarily . . . .").

Here, however, that usage is a strange one. Although the expression of possibility is one acceptable definition of the word "may," *see, e.g.*, *American Heritage Dictionary* 1112, it makes little sense in the context of section 706(a)—or almost any other statute, for that matter. Legislative bodies rarely enact into law their general observations about possibility or otherwise speculate about what "may" happen. Rather, statutory language serves to declare the rights and obligations of various parties.[5] It would be odd indeed to think that the statement "the debtor may convert . . . at any time" was merely Congress's way of noting that, from time to time, conversions have been known to occur.

Nor is the reading of "may" as expressing speculative possibility consistent with the commonsense understanding of the statutory phrasing. Returning to the example cited earlier—"You may use my rake at any time"—it would be

---

[5] Perhaps for this reason, most of this Court's cases interpreting the word "may" have focused on whether it merely permits a government actor to take an action where relevant conditions are satisfied or whether it *requires* the actor to do so. *See, e.g.*, *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193 (2000); *United States* v. *Rodgers*, 461 U.S. 677 (1983). We have not identified any case in which this Court, in construing statutory language, has adopted the view that "may" implies objective possibility, rather than permission.

bizarre to think that this statement means, "It is possible that at some point in the future you will use my rake." Likewise, the most reasonable and commonsense interpretation of "may" as used in section 706(a) is that it affords the debtor a permissive right to convert his case, rather than simply observing that a conversion is theoretically possible.

B. A Comparison Of Section 706(a) With Other Provisions Of The Bankruptcy Code Confirms That The Debtor's Right Of Conversion Is Absolute

The court of appeals suggested that, contrary to the ordinary usage, Congress's use of the phrase "[t]he debtor may convert" was intended to subject the debtor's decision to judicial override. It reached this result by comparing the language of section 706(a) to the language of section 1307(b), which provides: "On request of the debtor at any time ... the court shall dismiss a case under this chapter." The court of appeals reasoned that, had Congress intended to make the debtor's decision to convert under section 706(a) "absolute," it would have used the phrase "the court shall convert," rather than the phrase "the debtor may convert." *See* Pet. App. 33-34.

There are two basic difficulties with this argument. First, comparisons to other provisions of the Bankruptcy Code that are more closely related to section 706(a) yield the opposite conclusion. Second, there is every reason to believe that the phrases contrasted by the court of appeals are in fact synonymous.

1. The most significant error in the court of appeals' comparison between sections 706(a) and 1307(b) is that the two provisions do not refer to the same topic. In addition to being located at a great remove from section 706(a), section 1307(b) concerns *dismissal*, not conversion.[6]

---

[6] The distinction is important because, unlike conversion, the Bankruptcy Code never treats "dismissal" as an activity for a party rather than a court. On the language of the Code, conversion "may" be undertaken both by parties, *see, e.g.*, 11 U.S.C. § 706(a), and by courts acting at the

A more appropriate set of statutory comparisons confirms that, as the plain language suggests, section 706(a) grants the debtor an absolute right to convert a case from chapter 7 to chapter 13. Section 706(a) attaches the permissive "may" to the word "debtor," rather than to the word "court" or to any other party in interest. This is in stark contrast to section 706(b), which provides that "[o]n request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time."[7] The contrast between these two statutory neighbors is striking: unlike section 706(a), section 706(b) attaches the permissive "may" to the bankruptcy court rather than the debtor, and it requires notice and a hearing before the court may act. Therefore, if in section 706(a) Congress had intended to codify the court of appeals' view that the bankruptcy court *may*—but is not required to—grant the conversion, it would have structured section 706(a) just like the very next provision of the Bankruptcy Code.

Comparing section 706(a) to another of the Bankruptcy Code's conversion provisions, 11 U.S.C. § 1112(d), is also instructive. That section provides:

> The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
>
> (1) the debtor requests such conversion;

---

behest of a party in interest, *see, e.g.*, *id.* § 706(b). In contrast, the Bankruptcy Code nowhere states that a debtor "may dismiss" his case; nor do the Federal Rules of Bankruptcy Procedure ever make dismissal effective without a court order. *Compare* Fed. R. Bankr. P. 1017(f)(1)-(2), 9013, 9014 (governing dismissal under all sections) *with* Fed. R. Bankr. P. 1017(f)(3) (making conversions from chapters 12 and 13 effective "without court order when the debtor files a notice of conversion").

[7] This provision refers only to conversions to chapter 11 and not to chapter 12 or 13 because conversion to the individual reorganization chapters is *solely* at the discretion of the debtor. *See* 11 U.S.C. § 706(c) ("The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.").

> (2) the debtor has not been discharged under section 1141(d) of this title; and
>
> (3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

Id.

The differences between this provision and section 706(a) illustrate two crucial points. First, as with section 706(b), when Congress intended that the court retain discretion to deny conversion, it used language that emphasized the *court's* role (i.e., "The court may convert . . .") rather than that of the *debtor* (i.e., "The debtor may convert . . ."). Second, section 1112(d)(3) shows that when Congress intended the conversion right to be constrained by *equitable* considerations, it made that limitation explicit in the text.

In sum, a comparison between section 706(a) and either of these provisions is more telling than the one employed by the court of appeals, and provides compelling structural evidence that section 706(a)'s right to convert was indeed intended to be absolute.

2. More fundamentally, the alternate phrasings of sections 706(a) and 1307(b)—"[t]he debtor may convert" and "the court shall [convert]"—represent a distinction without a difference. The court of appeals stated that "the phrase 'shall dismiss' is unquestionably a comparatively stronger imperative than 'may convert.'" Pet. App. 45 n.2. But that analysis misses the fundamental point that "may" and "shall" are used in these two provisions to refer to *different entities*—debtors and courts. Congress's repeated preference for the crisp wording "[t]he debtor may convert . . . at any time," over the tangled phrase "[o]n request of the debtor at any time . . . the court shall [convert]," might easily have been a mere choice of style.

Notably, chapter 13's legislative history strongly suggests that the phrasings of sections 706(a) and 1307(b) are synonymous. Section 1307(a) is a near carbon copy of section 706(a). *See* 11 U.S.C. § 1307(a) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title

at any time."). Yet the Senate Report for section 1307 treats sections 1307(a) and 1307(b) as conferring equally unqualified rights to convert and to dismiss. *See* S. Rep. No. 95-989, at 141 ("Subsections (a) and (b) confirm, *without qualification*, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy case under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed." (emphasis added)). Thus, even if the comparison advanced by the court of appeals between sections 706(a) and 1307(b) were apt, it is clear that Congress intended these two structures to afford the same unqualified right to the debtor.

C. According To The Canon Of *Expressio Unius*, Congress's Express Provision Of Two Exceptions To The Debtor's Absolute Right Of Conversion Indicates The Absence Of Unexpressed Exceptions

The maxim that "inclusion of one thing indicates exclusion of the other" cements the plain meaning of section 706(a) as vesting discretion to convert in the debtor, unrestrained by any unwritten good-faith requirement. Section 706 provides that there are two, and only two, limitations on the debtor's right to convert: (1) the debtor may convert "if the case has not been converted" before, 11 U.S.C. § 706(a); and (2) the debtor may convert only if he is eligible for the new chapter, *id.* § 706(d). Absent some contrary indication, Congress's inclusion of certain prohibitive conditions implies the absence of others. *See Raleigh & Gaston R.R. Co.* v. *Reid*, 80 U.S. (13 Wall.) 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."). Indeed, the Court has recently rejected the contrary assertion in the context of the Bankruptcy Code. *See Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) ("This theory—that the expression of one thing indicates inclusion of others unless exclusion is made explicit—is contrary to common sense and common usage."); *see also Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohi-

bition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

One of the clearest applications of *expressio unius* is that when Congress makes explicit exceptions from general rules, the absence of inexplicit exceptions is strongly implied. Thus, in *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected the proposition that there were implicit exceptions to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, codified at 28 U.S.C. § 1679, in part because the Act provided certain *explicit* exceptions. 499 U.S. at 166-167. As this Court stated in a striking parallel: "Congress' express creation of these two exceptions convinces us that the [court of appeals] erred in inferring a third exception ...." *Id.* at 167.

Another example of the proper application of the canon is provided by this Court's opinion in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), which concerned employee use of compensatory time. The statute at issue stated that certain state employees would be permitted to use accrued compensatory time upon request "if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5). In light of this language, the Court stated that "the proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in § 207(o)(5)." 529 U.S. at 583.

The same is true here: given Congress's enumeration of certain conditions under which conversion will not be permitted, "the proper *expressio unius* inference is that a [court] may not ... deny [a debtor's conversion] for a reason other than that provided in § [706]." *See also Toibb* v. *Radloff*, 501 U.S. 157, 161 (1991) ("[W]e are loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11, because Congress took care in § 109 to specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code.... Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did

not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.").

Furthermore, the *expressio unius* maxim has its greatest force where, as here, it is eminently reasonable to assume that Congress considered the particular unwritten exception or condition at issue and specifically intended not to include it. *Cf. Andrus*, 446 U.S. at 616-617 (noting that canon is appropriate in absence of contrary legislative intent). Congress intended section 706(a) to provide a "one-time *absolute* right of conversion of a liquidation case to a reorganization," S. Rep. No. 95-989, at 94 (emphasis added), and so the legislative intent is fully in line with the reading called for by application of the canon. *See also infra* Section II.

Moreover, Congress has shown that it knew full well how to craft the kind of good-faith exception that the court of appeals read into the statute and did not do so in section 706(a). Throughout the Bankruptcy Code—including in the provision immediately following section 706—Congress has specified that a court may prevent a debtor from exercising certain rights "for cause," a phrase that has uniformly been construed to include bad faith. *See, e.g.*, 11 U.S.C. §§ 707(a), 1112(b), 1208(c), 1307(c); *see also In re SGL Carbon Corp.*, 200 F.3d 154, 160-161 & n.9 (3d Cir. 1999) (construing "cause" in section 1112(b) to include bad faith); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996) ("for cause" under section 1307(c) includes bad faith).

The Bankruptcy Code also makes a number of explicit references to good faith, as well as to the consequences of bad-faith conduct. *See, e.g.*, 11 U.S.C. § 1129(a)(3) (confirmation of chapter 11 plan only if "[t]he plan has been proposed in good faith"); *id.* § 1225(a)(3) (same for chapter 12); *id.* § 1325(a)(3) (same for chapter 13).[8] Congress's failure to in-

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[8] *See also* 11 U.S.C. § 707(b)(1) (dismissal for "abuse of the provisions of this chapter"); *id.* § 727(a), (d) (listing numerous bad acts for which discharge may be denied or revoked); *id.* § 1208(d) (conversion to chapter 7 for "fraud"); *id.* § 1228(d) (revocation of discharge obtained "through fraud"); *id.* § 1230(a) (revocation of confirmation if "procured by fraud");

clude any of this kind of language in section 706(a) thus reflects a deliberate choice not to include a good-faith requirement for exercising the right to convert. *See, e.g., Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quotation omitted)).

In view of both the enumerated exceptions to the right conferred in section 706(a), and the absence of any language mentioning "good faith" or "cause" in that provision, it must be presumed that Congress did not mean to include a bad-faith exception as grounds for withholding conversion.

D. Section 105(a) Of The Bankruptcy Code Does Not Support The Court Of Appeals' Reading

Rather than simply giving effect to the plain meaning of the statute, the court of appeals erroneously held that the petitioner was required to provide "evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process." Pet. App. 33. The only statutory source to which the court of appeals pointed for this "presumptive power" was section 105(a) of the Bankruptcy Code, which the court of appeals dubbed an "anti-abuse provision" that "looms large" in its construction of the statute. *Id.*

Section 105(a), however, merely provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title.*" 11 U.S.C. § 105(a) (emphasis added). The provision was drawn from the All Writs Act and merely "preserves" the powers traditionally exercised in equity. *See, e.g.,*

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id. § 1304(b) (chapter 13 debtor engaged in business must operate subject "to such limitations or conditions as the court prescribes," as well as certain restrictions imposed on bankruptcy trustees in the operation of businesses); *id.* § 1328(e) (revocation of discharge obtained "through fraud"); *id.* § 1330(a) (revocation of confirmation order for fraud).

Palmer v. *United States (In re Palmer)*, 219 F.3d 580, 582 n.2 (6th Cir. 2000).

Whatever equitable powers section 105(a) may preserve, it neither provides a basis for disregarding the plain meaning of the Bankruptcy Code nor establishes a "clear statement" rule under which bankruptcy courts serve as "roving commission[s] to do equity" unless Congress expressly limits their authority. *United States* v. *Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Rather, as the very text of section 105(a) indicates, any equitable powers it confers "must and can only be exercised within the confines of the Bankruptcy Code." *Northwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988); *see also United States* v. *Noland*, 517 U.S. 535, 543 (1996) (denying power of bankruptcy court to equitably subordinate tax penalties contrary to the congressional schedule of priorities and noting that "[t]he [equity] chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule" (second alteration in original) (quotations omitted)); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 224-225 (3d Cir. 2004) (noting that while it might be efficacious to use section 105(a) to expand the jurisdiction of the bankruptcy court, "the exercise of bankruptcy power must be grounded in *statutory* bankruptcy jurisdiction" (emphasis added)).

Here, as set forth above, the language of the Code grants a debtor the absolute right to convert a case from chapter 7 to chapter 13, subject only to clear *statutory* exceptions. That plain language is controlling. The court of appeals thus proceeded from the wrong starting point in requiring the petitioner—or more, Congress—to rebut the bankruptcy court's "presumptive power" to deny conversion. Rather, any "presumptive power" must stem from the text of the Bankruptcy Code, and the burden of persuading the court to reject "the most natural reading" of the statute, even for reasons of "equity," is "exceptionally heavy." *Hartford Underwriters*, 530 U.S. at 9 (quotation omitted).

E. The Code's Express Mechanisms For Checking Bad-Faith Proceedings In Chapter 13 Further Imply The Absence Of An Unexpressed Bad-Faith Exception To The Right To Convert

A judicially created good-faith requirement for conversion, rooted in principles of "equity," is even less appropriate where, as here, Congress has provided specific mechanisms for addressing the problem of bad faith. The court of appeals concluded that, because a case can ultimately be reconverted to chapter 7 by reason of bad faith, it would be "pointless spinning of judicial wheels" to allow the debtor an unqualified right of initial conversion. Pet. App. 39. But just the opposite is true. The presence of this alternative statutory mechanism for protecting the interests of creditors is a reason to follow—not disregard—the clear statutory mandate. *See generally Seminole Tribe* v. *Florida*, 517 U.S. 44, 74 (1996) (refusing to apply a judicially created remedy "[w]here Congress has created a remedial scheme"); *Schweiker* v. *Chiliky*, 487 U.S. 412 (1988) (same).

Chapter 13 contains several express provisions that are specifically intended to protect creditors from debtors who would misuse the chapter 13 process. For example: (1) the court always has the option of reconverting a case to chapter 7; (2) the best-interest test ensures that no chapter 13 plan can be confirmed unless creditors will receive at least as much as they would under chapter 7; and (3) the chapter 13 trustee exercises the same powers of financial investigation and oversight as does the chapter 7 trustee.

1. If a court believes that a conversion has been undertaken in bad faith, the court may convert the case back to chapter 7. Section 1307(c) allows a case to be converted to chapter 7 by the court "for cause," which has consistently been construed to include bad faith. *See In re Lilley*, 91 F.3d 491 ("for cause" under section 1307(c) includes bad-faith filings). Accordingly, under the statutory scheme as drafted by Congress, a debtor has one opportunity to convert the case and attempt to persuade the court that he will propose a plan in good faith to the benefit of all. *Cf.* 11 U.S.C. § 1307(c); Fed. R. Bankr. P. 1017(f)(1), 9014 (both requiring

notice and a hearing before the court may convert back to chapter 7).

It is of course the case that a debtor's efforts in this regard may fail, and if so, the case may well be converted back to chapter 7. But the process that the court of appeals described as "wheel spinning" is just an alternative means to serve the same policy objectives as the judicially created bad-faith exception—and it is the one that Congress has sanctioned. Because the statute provides a means of achieving these objectives, it is inappropriate to invent an extra-statutory means to accomplish the same purpose. Rather, the statute should simply be construed according to its plain and unambiguous terms. *See Lamie*, 540 U.S. at 534.

2. The best-interest test also provides powerful assurance that a debtor cannot convert a case to chapter 13 in order to evade his creditors. Under sections 1325(a)(4) and 1328(b)(2), a repayment plan cannot be confirmed, nor a discharge granted, unless each unsecured creditor will receive a payment greater than or equal to the amount he would have received upon immediate liquidation in chapter 7.[9]

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[9] Even secured creditors—who may oppose the delay caused by conversion because each passing day causes depreciation in the value of the assets securing their claims—are "adequately protected" against debtor delay by the doctrine of adequate protection. *See, e.g., United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) ("It is common ground that the . . . interest [in secured property] is not adequately protected if the security is depreciating during the term of the stay."); *Metropolitan Life Ins. Co.* v. *Morel Holding Corp.* (*In re Morel Holding Corp.*), 75 F.2d 941, 942 (2d Cir. 1935) (Hand, J.) (discussing adequate protection and introducing the concept of the "indubitable equivalen[t]," now codified at 11 U.S.C. § 361(3)). Under the doctrine of adequate protection, a debtor who seeks to use a secured creditor's collateral while endeavoring to reorganize must provide some assurance to those secured creditors that, if the plan fails and assets are eventually liquidated, creditors will be compensated for the depreciation of the collateral that occurs between the bankruptcy filing and the ultimate liquidation. This assurance often takes the form of periodic payments (that compensate for the depreciation) and ensures that the debtor is not using up the property of his creditors in the course of a failed repayment scheme. *See also* 11 U.S.C. § 1326(a)(1)(C) (provision added to Bankruptcy Code with the 2005 amendments providing a creditor holding a claim secured by per-

Conversion to chapter 13 thus cannot function as an effective means for a debtor to evade his creditors because, by definition, discharge in chapter 13 is impossible unless the debtor will pay his creditors at least as much as they would have received in an immediate liquidation.

3. Finally, although the court of appeals implied that a debtor might attempt to convert to chapter 13 to evade the searching eye of the bankruptcy trustee, *see* Pet. App. 30, it is worth noting that chapter 13 trustees exercise the same essential powers as chapter 7 trustees, including the power to investigate the debtor's financial affairs and to oppose discharge if advisable, *see* 11 U.S.C. § 1302(b)(1) (incorporating most powers of the chapter 7 trustee by reference). Although the new trustee will not have the ability to dispose of the property of the estate, the debtor will be no more able to hide assets from the chapter 13 trustee than from the chapter 7 trustee. And if such hidden assets are found, then reconversion back to chapter 7 is an available remedy.

In sum, chapter 13 provides a host of mechanisms to protect creditors from the risk that a debtor will abuse the right of conversion. The availability of these clear and express protections provides a strong structural basis for adhering to Congress's text, rather than inventing a new protection that cannot be reconciled with the plain language of the statute.

II. THE LEGISLATIVE HISTORY OF SECTION 706(a) CONFIRMS THAT CONGRESS DID NOT INTEND FOR THE DEBTOR'S RIGHT TO CONVERT TO BE SUBJECT TO JUDICIAL DISCRETION

Because the clear text of section 706(a) provides that a debtor's right to convert is not subject to judicial override, the Court's inquiry need not proceed beyond this point. *See Lamie*, 540 U.S. at 534. But even if there were some ambiguity in the text of section 706(a), the statute's legislative history makes absolutely plain that Congress did not intend

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sonal property with "adequate protection" during the period in which a chapter 13 debtor is making payments under a plan).

to condition the debtor's right to convert on the approval of the bankruptcy court.

The relevant committee reports state:

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts.

S. Rep. No. 95-989, at 94; *see also* H.R. Rep. No. 95-595, at 380. One would be hard-pressed to create a clearer statement of congressional intent to place the conversion decision in the hands of the debtor, unrestrained by the court. That the congressional committees described the debtor's conversion right as "absolute" and noted that he should "always" be given the chance to repay his debts is compelling evidence that Congress intended there to be no limitations on the debtor's right to convert beyond those present in the text of the statute itself.[10]

The court of appeals' attempts to explain away this clear legislative intent to create an "absolute" right of conversion under section 706(a) are unconvincing. First, the court of appeals reasoned that Congress's reference to an "absolute right of conversion" could not be taken literally because the

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[10] The contrast between the Senate Report's descriptions of sections 706(a) and 706(b) is also instructive. Contrary to the description of section 706(a) as vesting an "absolute" right in the debtor, the Report's interpretation of the language of section 706(b), "[o]n request of a party in interest . . . the court may convert," is that:

> [s]ubsection (b) permits the court, on request of a party in interest and after notice and a hearing, to convert the case to chapter 11 at any time. *The decision whether to convert is left in the sound discretion of the court*, based on what will most inure to the benefit of all parties in interest.

H.R. Rep. No. 95-595, at 380 (emphasis added). *See also id.* at 405 (similar contrast in chapter 11 history); S. Rep. No. 95-989, at 117 (same); *id.* at 141 (similar contrast in chapter 13 history).

provision itself limits conversion to instances where the case has not been converted previously. Pet. App. 37. But Congress did not describe the right merely as "absolute," but as a "one-time absolute" entitlement. *See* S. Rep. No. 95-989, at 94. Nor is this argument strengthened by the existence of the caveat in section 706(d), limiting conversion to cases in which the debtor is eligible to be a debtor under the new chapter. The Senate Report also mentioned the eligibility requirement of section 706(d), implying that when it called the right in section 706(a) "absolute," Congress understood that statement to be subject to the obvious qualification that the debtor be eligible to proceed under the new chapter.

It is clear, therefore, that Congress was well aware of (a) the one-time-only limitation and (b) the eligibility limitation, and nevertheless clearly stated that—subject to only those two limitations—the right to conversion was "absolute." By doing so, it rejected the possibility that other unexpressed limitations on the right to convert might be judicially imposed.

The court of appeals also sidestepped the clear meaning of section 706(a)'s legislative history by misinterpreting the last sentence, which states, "The policy of the provision is that the debtor should always be given the opportunity to repay his debts . . . ." S. Rep. No. 95-989, at 94. The court of appeals imported into this sentence the view that section 706(a)'s conversion right applies only to "honest debtors." Pet. App. 38. But as was true with respect to the statutory text itself, a good-faith exception to the "always" applicable "opportunity" would have been easy to note, and its absence is therefore telling. In short, nothing in the legislative history—any more than in the text itself—supports the court of appeals' judicially created limitation on the right to conversion. Indeed, the legislative history is decisively to the contrary.

III. CONGRESS HAD LEGITIMATE POLICY REASONS FOR ALLOWING AN ABSOLUTE RIGHT OF CONVERSION EVEN UNDER CIRCUMSTANCES WHERE PRIOR BAD FAITH HAS BEEN SHOWN

As the recent amendments to the Bankruptcy Code demonstrate, creditors will often prefer that a debtor convert a chapter 7 case to chapter 13. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. A principal purpose of those amendments was to require debtors who might otherwise file for a chapter 7 bankruptcy to propose a chapter 13 plan that would require the use of post-bankruptcy income to repay pre-bankruptcy debt. Section 706(a)'s "absolute" right of conversion facilitates this process. It could therefore represent a reasonable congressional judgment that the potential benefits of a good-faith chapter 13 plan far outweigh the harms of merely allowing the debtor to propose one—especially in light of the many mechanisms set forth in chapter 13 to protect the rights of creditors.[11]

The substantive effect of reading section 706(a) to mean what it says is to provide a debtor one opportunity to persuade both the creditors and the court that he should be entitled to proceed in chapter 13. To be sure, there is no assurance at all that the debtor will succeed in those efforts. And if the debtor is unable to propose an acceptable plan or is found to abuse the opportunity in any respect, the court has the unquestioned authority promptly to return that debtor to chapter 7. But the effect of the statutory language is to give the debtor one fair chance to propose a plan—a plan that must be to the benefit of the creditors and may well be to the benefit of all. It is therefore not mere "spinning of judicial wheels" to allow such a plan to be proposed, even if the court may not ultimately accept it.

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[11] In fact, because the debtor cannot use estate property to pay his bankruptcy attorney unless he proceeds in chapter 13, *see Lamie*, 540 U.S. 526, a debtor *might* be unable to obtain counsel who could formulate a chapter 13 plan absent the ability to convert a chapter 7 case.

While a debtor whose conversion would otherwise be denied on "bad faith" grounds may certainly face an uphill battle in proposing his plan, the statute Congress wrote plainly provides individual debtors with one opportunity to do so. There is no basis for the courts to strip it away.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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